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McKINNEY'S
Consolidated Laws of New York
ANNOTATED

BOOK 49

REAL PROPERTY LAW

L-2 R. S. S. 10/28/37.

S. D.



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Received OCT 7 1935

**Consolidated Laws of New York
Annotated**

THE CONSOLIDATED LAWS OF NEW YORK

ANNOTATED

The books of this edition are arranged and numbered as follows:

1. REPORT OF CONSOLIDATORS AND TREATISE ON STATUTES AND STATUTORY CONSTRUCTION
2. CONSTITUTION OF NEW YORK ANNOTATED, CONSTITUTION OF THE UNITED STATES, DECLARATION OF INDEPENDENCE AND MAGNA CHARTA
3. AGRICULTURAL (*Repealed*)
- AGRICULTURE AND MARKETS
(*See Farms and Markets*)
- 3a. ARBITRATION
4. BANKING
5. BENEVOLENT ORDERS
6. BUSINESS CORPORATIONS
7. CANAL
- 7a. CITY HOME RULE
- 7a. CITY LOCAL OPTION (*Repealed*)
8. CIVIL RIGHTS
9. CIVIL SERVICE
- 9a. CONDEMNATION
10. CONSERVATION
- 10a. CO-OPERATIVE CORPORATIONS
- 10b. CORRECTION
11. COUNTY
12. DEBTOR AND CREDITOR
13. DECEDENT ESTATE
14. DOMESTIC RELATIONS
15. DRAINAGE (*Repealed*)
16. EDUCATION
17. ELECTION
- 17a. EMPLOYERS' LIABILITY
18. EXECUTIVE
- 18a. FARMS AND MARKETS
(*Now Agriculture and Markets*)
- GENERAL ASSOCIATIONS
(*See Joint-Stock Association*)
19. GENERAL BUSINESS
20. GENERAL CITY
21. GENERAL CONSTRUCTION
22. GENERAL CORPORATION
- 22a. GENERAL HIGHWAY TRAFFIC
(*Repealed. See Vehicle and Traffic Law*)
23. GENERAL MUNICIPAL
24. HIGHWAY
25. INDIAN
26. INSANITY
(*Now Mental Hygiene*)
27. INSURANCE
28. JOINT-STOCK ASSOCIATION
(*Now General Associations*)
29. JUDICIARY
30. LABOR
31. LEGISLATIVE
32. LIEN
33. LIQUOR TAX (*Repealed*)
34. MEMBERSHIP CORPORATIONS
- 34a. MENTAL DEFICIENCY (*Repealed*)
- 34a. MENTAL HYGIENE
35. MILITARY
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36. NAVIGATION
37. NEGOTIABLE INSTRUMENTS
38. PARTNERSHIP
39. PENAL
40. PERSONAL PROPERTY
41. POOR (*Repealed. See Public Welfare*)
42. PRISON
(*Now Correction*)
43. PUBLIC BUILDINGS
44. PUBLIC HEALTH
45. PUBLIC LANDS
46. PUBLIC OFFICERS
47. PUBLIC SERVICE COMMISSION
- 47a. PUBLIC WORKS
- 47b. PUBLIC WELFARE
48. RAILROAD
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51. SALT SPRINGS
52. SECOND CLASS CITIES
53. STATE BOARDS AND COMMISSIONS
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61. TOWN
62. TRANSPORTATION CORPORATIONS
- 62a. VEHICLE AND TRAFFIC
63. VILLAGE
64. WORKMEN'S COMPENSATION
65. UNCONSOLIDATED LAWS
66. COMPLETE TABLE OF LAWS
REPEALED
67. GENERAL INDEX

The above is a list of the Consolidated Laws as constituted at the close of the regular session of the Legislature of 1932. Subsequent additions or changes will be noted in the list of laws printed on p. 3 of the Supplement to the General Index, Book 67.

4th ed. copy

THE CONSOLIDATED LAWS OF NEW YORK, ANNOTATED

AS AMENDED TO THE CLOSE OF THE
REGULAR AND EXTRAORDINARY SES-
SION OF THE LEGISLATURE OF 1917

Compiled under the Editorial Supervision of
WILLIAM M. MCKINNEY

BOOK 49
Real Property Law



EDWARD THOMPSON COMPANY
Northport, New York
1917

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STATE OF NEW YORK } ss :
OFFICE OF THE SECRETARY OF STATE }

In pursuance of the authority vested in me, by section 932 of the Code of Civil Procedure, I, Francis M. Hugo, Secretary of State, hereby certify that the copies of the laws contained in this volume are correct transcripts of the text of the original laws, and in accordance with such section are entitled to be read in evidence.

Given under my hand and the seal of office of the Secretary of State, at the Capitol in the City of Albany, this 30th day of October, 1917.

[L. s.]

FRANCIS M. HUGO,
Secretary of State.

The annotations in this book close with the cases reported in the following volumes:

**220 New York
175 Appellate Division
97 Miscellaneous
164 New York Supplement**

The Supplements will cover decisions from these points.

REAL PROPERTY LAW

LAWS 1909, CHAP. 52

AN ACT relating to real property, constituting chapter fifty of the consolidated laws.

Became a law February 17, 1909, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

[7]

REAL PROPERTY LAW

CHAPTER 50 OF THE CONSOLIDATED LAWS

- Article
1. Short title; definitions (§§ 1, 2).
 2. Tenure of real property (§§ 10-18).
 3. Creation and division of estates (§§ 30-72).
 4. Uses and trusts (§§ 90-117).
 5. Powers (§§ 130-182).
 6. Dower (§§ 190-207).
 7. Landlord and tenant (§§ 220-232).
 8. Conveyances and mortgages (§§ 240-274).
 9. Recording instruments affecting real property (§§ 290-332).
 10. Discharge of ancient mortgages (§§ 340-344).
 11. Quieting title to real property (§§ 360-366).
 12. Registering title to real property (§§ 370-435).
 13. Cemetery lands (§§ 450, 451).
 14. Laws repealed; construction; when to take effect (§§ 460-462).

ARTICLE 1

SHORT TITLE; DEFINITIONS

- Section 1. Short title.
2. Definitions.

§ 1. Short title. This chapter shall be known as the "Real Property Law."

The original Real Property Law was chapter 46 of the "General Laws," being L. 1896, ch. 547. This section was derived from Real Property Law of 1896, § 1, part. The remainder of the original section is covered by section 381.

Construction of chapter: see *infra*, § 461.

Sovereignty of the people in lands: see CONSTITUTION, art. 1, § 10.

Allodial tenure of lands within state: see CONSTITUTION, art. 1, § 12.

Preservation of royal and state grants of land: see CONSTITUTION, art. 1, § 17.

Eminent domain: see CONSTITUTION, art. 1, §§ 6, 7.

Vesting of crown lands in people of state: see PUBLIC LANDS LAW, § 4.

Grants of land under water: see PUBLIC LANDS LAW, § 75 et seq.

Buying pretended titles to real property: see PENAL LAW, § 2032.

Unlawful intrusion on real property: see PENAL LAW, § 2036.

Untrue and misleading advertisements for sale of real estate: see PENAL LAW, § 421.

Affixing advertisements to real property of another: see PENAL LAW, § 121.

Severance of fixture from realty: see PENAL LAW, § 1291.

Burning crops or timber: see PENAL LAW, § 1421.

Lien of judgment against real property: see Code Civ. Pro., § 1251.

Title guaranty companies: see INSURANCE LAW, § 170 et seq.

Evidence in actions for injury to unoccupied lands and timber thereon: see Code Civ. Pro., § 960.

Delivery of possession of real property to purchaser under a judgment: see Code Civ. Pro., § 1675.

Conveyance of real property to holder of contract made by decedent: see Code Civ. Pro., § 2697.

Sale of decedent's real property to pay debts: see Code Civ. Pro., § 2703 et seq.

Submission to arbitration of claim to estate in real property: see Code Civ. Pro., § 2365.

Writ of assessment of damages for land taken by state: see Code Civ. Pro., § 2103 et seq.

Judgment directing sale of real property to be entered in county where property is situated: see Code Civ. Pro., § 1677.

Conduct of judicial sale of real property: see Code Civ. Pro., § 1678.

Divestment of title before deed on execution sale of realty: see Code Civ. Pro., § 1440.

Attachment of property: see Code Civ. Pro., § 635 et seq.

Execution against property: see Code Civ. Pro., § 1389 et seq.

Jurisdiction of Supreme and County Courts in actions relating to real property: see Code Civ. Pro., §§ 217, 340, 348.

Actions relating to real property: see Code Civ. Pro., § 1496 et seq.

§ 2. Definitions. The terms "real property" and "lands" as used in the first eight articles of this chapter are co-extensive in meaning with lands, tenements and hereditaments.

This section was derived from the Real Property Law of 1896, § 1. The words "the first eight articles of" were added by the consolidation. The report of the Board of Statutory Consolidation (1907), at page 4896, has the following note relative to the addition: "This amendment proposed restores the usage of the Revised Statutes which confined the definition of this section to the matter contained in the first eight articles. Observe that Art. 9 of this chapter (§ 240, now § 290) contains its own definitions, slightly at variance with that in § 2. Therefore the definition of § 2 is not, as it now stands, correct."

Section 2 of the Real Property Law of 1896 is now covered by section 10.

Chattels real and chattel interests in real estate: see *infra*, § 33.

"Real property" as relating to recording of instruments: see *infra*, § 290, subd. 1.

"Estate" and "interest in property" as relating to conveyances and mortgages: see *infra*, § 240, subd. 4.

Term "real property": see GENERAL CONSTRUCTION LAW, § 40.

"Real property" as used in Lien Law: see LIEN LAW, § 2.

"Real property" as affecting descent and distribution: see DECEDENT ESTATE LAW, § 80, subd. 1.

"Land," "real estate," and "real property" as used in Tax Law: see TAX LAW, § 2, subd. 3.

"Real property" and "real estate" relative to taxation on mortgages: see TAX LAW, § 250.

"Real estate" as used in Conservation Law: see CONSERVATION LAW, § 430, subd. 1.

"Real property" as used in Condemnation Law: see Code Civ. Pro., § 3358.

"Real property" as used in Surrogates' Courts Act: see Code Civ. Pro., § 2768, subd. 13.

"Real property" as including leasehold property: see Code Civ. Pro., § 1430.

Meaning of "distinct parcel" of real property: see Code Civ. Pro., § 3343, subd. 16.

Testimony of surveyor and proof of standard of measurement: see Code Civ. Pro., § 841-a.

What interest in real property may be attached: see Code Civ. Pro., § 645.

Meaning of "plant" as used with reference to realty: see Ann. Cas. 1917A 321 note.

What constitutes a real estate dealer: see Ann. Cas. 1917A 961 note.

Rights under optional land contracts as constituting real property: see L. R. A. 1916F 358 note. *Oil and gas lease as real property:* see 42 L. R. A. (N. S.) 472 note.

Use of term "real property" in statutes.—The term "real property" is now commonly employed in statutes instead of "lands, tenements and hereditaments"; and the term "personal property" is now used to designate chattels and every species of property which is not real estate. Matter of Althause, (1901) 63 App. Div. 252, 71 N. Y. S. 445, affirmed without opinion (1901) 168 N. Y. 670, 61 N. E. 1127. The words "real estate" in legal signification include all interests in land, whether in possession, reversion or remainder. They are used as coextensive in meaning with lands, tenements and hereditaments. Floyd v. Carow, (1882) 88 N. Y. 560; Jenkins v. Fahey, (1878) 73 N. Y. 355, reversing 11 Hun 351; New York v. Mabie, (1855) 13 N. Y. 151, 64 Am. Dec. 538, reversing 2 Duer 401; Pelletreau v. Smith, (1859) 30 Barb. 494; Westervelt v. People, (1838) 20 Wend. 416, affirming 17 Wend. 674; Jackson v. Parker, (1828) 9 Cow. 73. And signify such an interest as one may have in land. Jackson v. Catlin, (1807) 2 Johns. 248, 3 Am. Dec. 415.

"Lands."—The term "land," in its most general sense, comprehends any ground, soil or earth, whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths, and it includes all things of a permanent and substantial nature; not only the face of the earth, but everything under it or over it. Mott v. Palmer, (1848) 1 N. Y. 564; Canfield v. Ford, (1858) 28 Barb. 336. "Lands, tenements and hereditaments are the subjects of real property; the only things in which estates of that nature can exist. An estate in land is the interest which the owner has therein. Such estates may greatly vary in quantity or duration, as they also may in respect to the time of possession or enjoyment. As to quantity, they are less than freehold, as terms for years; or freehold, as for life or in fee. The latter class is also divided into estates in fee simple and fee tail." Van Rensselaer v. Poucher, (1847) 5 Denio 35. And where a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass, if the land under water lies within the bounds of the grant. Rogers v. Jones, (1828) 1 Wend. 237, 19 Am. Dec. 493. Where a statute authorized the taking of "lands" for canal purposes it was held that the stone in the earth and all else included in the general definition of the term "land" could be taken. Baker v. Johnson, (1842) 2 Hill 312.

Tenements.—The term "tenements" is of greater meaning and extent, sometimes, than land, and includes not only land, but rents, commons, and several other rights and interests issuing out of or concerning land. Canfield v. Ford, (1858) 28 Barb. 336.

Hereditaments.—The word "hereditaments" is a more comprehensive term in law than lands and tenements, and includes whatever may be inherited, corporeal or incorporeal. Canfield v. Ford, (1858) 28 Barb. 336. And hereditaments are included in the term "estates of inheritance." Such estates may be held in fee, and are capable of having the same interest and estate created in them as may or can pertain to any real estate. They are created, granted, assigned, extinguished and inherited in the same manner and by the same forms as other real property, and are distinguished therefrom mainly by the fact that they are incorporeal instead of corporeal property. Thus it is said by elementary writers that the word "hereditaments" is more extensive in its signification than land or tenements, and signifies anything capable of being inherited, and as applied to realty is divided into corporeal and incorporeal. Mellis v. Munson, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575. Water is not land, but is an incident to land which gives to the owner of the land certain rights and privileges in the use of the water. If it flows over his own land it is so far identified with the realty as to be a corporeal hereditament; and if the right is to use it as it flows over the lands of another it is an incorporeal hereditament. In either event the right of property in the water is usufructuary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected. Since such a hereditament is incident to land it naturally passes with land, and, therefore, it is properly classified as real property. Tracy Development Co. v. Becker, (1914) 212 N. Y. 488, 106 N. E. 330, reversing 160 App. Div. 914, 144 N. Y. S. 1148.

Accretion and erosion.—To give to a littoral proprietor title to land by accretion, the increase must be by such imperceptible degrees that, although persons are able to perceive from time to time that the land has encroached on the sea line, they could not perceive the progress at the time it was made. While the title of such a proprietor is liable to be lost by erosion or submergence, the erosion to effect that result must be accompanied by a transportation of the land beyond the owner's boundary, and it may be returned by accretion, in which case the ownership temporarily lost may be regained: and so, land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity of the land from being established. If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity and boundary on the firm land. And so if an island forms upon the land submerged it belongs to the original owner. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tide-ways outside of the boundaries of property which has been the subject of individual ownership. The owners of adjacent uplands are entitled to lands formed by accretion or reliction in front of and contiguous to their property in certain proportions according to the formation of their respective shore lines. However such formations may be commenced or continued, the right of one owner of the uplands to follow and appropriate them ceases when the formation passes the line of his coterminous neighbor. *Mulry v. Norton*, (1885) 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206, affirming 29 Hun 660.

As to what constitutes accretions, see 58 L. R. A. 193 note. As to rule of apportionment of accretion between riparian proprietors generally, see Ann. Cas. 1914A 481 note. As to interference with accretions, see 58 L. R. A. 209 note. As to division of alluvion between adjoining riparian owners, see notes, 21 L. R. A. 776; 25 L. R. A. (N. S.) 257. As to erosion or submergence, see notes, 5 L. R. A. 688; 38 L. R. A. 849; 51 L. R. A. 425; 25 L. R. A. (N. S.) 257; 35 L. R. A. (N. S.) 230.

Incorporeal real property.—Incorporeal real property is defined to be a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it. *Mellis v. Munson*, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575.

Meaning of seizin.—The owner of a fee simple estate in possession in land has all the property therein of which the thing is susceptible. Such an owner is sometimes said to be seized of the land, but that means only that the entire property of the land is in him; or, in other words, that he is seized in fact of a fee simple estate therein. So one who has an estate for life, but not in fee in land, although owner of a part only of the entire property, is also said to be seized of the land itself. These, however, are but forms of speech, and are not strictly accurate; the term seizin, as already stated, has reference to the estate of the person seized, and not to the thing in which such estate exists. It is applicable to freehold estates only, for a person is said to be possessed, not seized, of any less estate. The seizin is of the estate, and according to its quality and quantity. The estate may be present or future in point of enjoyment, for there may be a seizin of each: as it also may be in fee simple, or fee tail where such estates are not prohibited, or for life. *Van Rensselaer v. Poucher*, (1847) 5 Denio 35.

Telephone wire.—It has been held that an action of ejectment will lie where the soil is not touched but part of the space a few feet above is occupied by a telephone wire unlawfully strung above the owner's premises. The court said: "The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. . . . So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part

of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly." *Butler v. Frontier Telephone Co.*, (1906) 186 N. Y. 486, 79 N. E. 716, 116 A. S. R. 563, 9 Ann. Cas. 858, 11 L. R. A. (N. S.) 920, affirming 109 App. Div. 217, 95 N. Y. S. 684.

Sand.—Sand placed on land for storage and not for the improvement of the soil remains personalty and may be the subject of conversion; and where plaintiff deposited sand on the land of another without permission and the land was later sold and the grantee disposed of the sand to a third party, both the grantee and the purchaser of the sand were held liable for conversion, although the former did not know of plaintiff's ownership. *Graham v. Purcell*, (1908) 126 App. Div. 407, 110 N. Y. S. 813. Soil removed from the land of one person and placed on the land of another by his consent, without any intention on the part of the former to reclaim it, or any agreement authorizing him to remove it, becomes a part of the land of the latter. *Lacustrine Fertilizer Co. v. Lake Guano, etc., Co.*, (1880) 82 N. Y. 476, affirming 19 Hun 47.

Special franchises.—It has been held that special franchises "are rights or privileges of a public nature, the exercise of which is permitted under grants from the state to corporations," and which the legislature in the Tax Law has classified as real estate. "In the nature of incorporeal hereditaments, at common law, franchises partook of the nature of realty and these special franchises are inseparable from real property in their enjoyment. They fall, necessarily, into that one of the two general divisions of property made by the statute, which is described as real estate." *Levy v. McClellan*, (1909) 196 N. Y. 178, 89 N. E. 569, affirming 132 App. Div. 913, 116 N. Y. S. 1087.

Leases for years.—The interest of a tenant of realty under a lease for years is not real estate, but is a chattel real, and is not liable to sale on an execution. *Matter of Ehrsam*, (1899) 37 App. Div. 272, 55 N. Y. S. 942. And a leasehold estate for years in lands situate in this state owned by a resident of another state will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governs the person of its owner. *Despard v. Churchill*, (1873) 53 N. Y. 192.

Trees.—It is well settled that standing trees form part of the land, and as such are real property, and an owner in fee of the land has the same estate in the trees as in the soil, unless there has been a severance of ownership by such conveyance as is adequate to effect it. *Goodyear v. Vosburgh*, (1869) 57 Barb. 243; *Brooks v. Galster*, (1868) 51 Barb. 196; *Vorebeck v. Roe*, (1867) 50 Barb. 302; *Warren v. Leland*, (1848) 2 Barb. 613; *Lansingburgh Bank v. Crary*, (1847) 1 Barb. 542; *Green v. Armstrong*, (1845) 1 Denio 550. Although different opinions have been held as to the rights of owners of adjoining land in trees planted, the bodies of which are wholly upon that of one, while the roots extend and grow into that of the other and derive nourishment therefrom, it has been held that the tree is wholly the property of him upon whose land the trunk stands; and the ground or reason assigned for holding that the owner of land on which no part of a tree stands, but into which the roots extend, has any interest, is that the tree derives its nourishment from both estates. *Hoffman v. Armstrong*, (1872) 48 N. Y. 201, 8 Am. Rep. 537; *Dubois v. Beaver*, (1862) 25 N. Y. 123, 82 Am. Dec. 326, affirming 34 Barb. 547. It has been held that chapter 93 of the Laws of 1863 (since repealed), which provided that all persons owning lands fronting upon any highway (except in cities and incorporated villages) may plant and have shade trees along the roadside or sidewalks, authorized abutting owners to plant such trees and secured to them, as against the public, the right to the continuance of the growth of the trees. *Edsall v. Howell*, (1895) 86 Hun 424, 33 N. Y. S. 892. As to ownership of trees on land within the bounds of any highway see HIGHWAY LAW, § 333.

Trees reared in nursery grounds expressly for sale as merchandise possess none of the legal characteristics of fixtures where they never had an existence independent of the freehold, were not designed for use in connection with it, but were there solely for growth, and destined to become a part of other realty. Nursery trees more nearly resemble emblements, though they are not strictly such, emblements being the annual product or fruit of things sown or planted. Hops, berries and the like are emblements, but the roots and bushes from which they grow are perennial, and not strictly emblements. *Hamilton*

v. Austin, (1885) 36 Hun 138. As between mortgagor and mortgagee, trees grown in a nursery expressly for sale as merchandise are covered by the mortgage, and those standing on the land when it is sold under a foreclosure pass with the land to the purchaser. *Hamilton v. Austin, (1885) 36 Hun 138; King v. Wilcomb, (1849) 7 Barb. 263.*

Oil wells.—Oil wells are personal property for all purposes except taxation. *Ruck v. Cleveland, (1911) 143 App. Div. 874, 128 N. Y. S. 864; DeHart v. Enright, (1916) 93 Misc. 213, 157 N. Y. S. 46.* And all fixtures and machinery used in operating the same must be regarded as personal property. *Willetts v. Brown, (1886) 42 Hun 140.* As to nature of oil and gas leases, see 42 L. R. A. (N. S.) 472 note.

Conveyance of leasehold interest in oil lands.—The right to produce oil is personal property and cannot pass under a deed in which the executors and devisees of a deceased lessee of oil lands purport to convey all the lands owned by them or in which they have an interest, as the deed announces an intent to convey an interest in real estate and not in personal property. *Wagner v. Mallory, (1902) 169 N. Y. 501, 62 N. E. 584, affirming 41 App. Div. 120, 58 N. Y. S. 526.* See also *infra*, § 33 note.

Rights of mortgagee under lease of oil lands.—Section 39 of the General Construction Law does not provide for or have the effect of vesting a legal title to the rights held under a lease for years of oil lands, nor does it enable a mortgagee or assignee, as security of the lease, to take title to it. The law, so far as the relation of the mortgagee to the leasehold interest is concerned, remains the same as before that part of the section relating to oil wells was enacted (L. 1883, ch. 372). *Broman v. Young, (1885) 35 Hun 173.*

Mining rights.—Where parties entered into a contract which stated in substance that plaintiff and her husband, as parties of the first part, for certain considerations "hath leased and doth hereby lease" to defendant "all the coal contained in or under" certain lands in the state of Pennsylvania, described in the contract, which belonged to plaintiff, "in any event to include all the coal that can be economically mined or taken out from the above-described premises," it was held, in an action based upon the contract, that the legal effect of the instrument was to vest in the defendant an estate in fee in the coal as a separate piece of land. *Genet v. Delaware, etc., Canal Co., (1890) 122 N. Y. 505, 25 N. E. 922, affirming 56 Super. Ct. 27.* But where coal is severed from the freehold it may, like timber or other product of the soil, become personal property. No one would claim that a ton of Pennsylvania anthracite coal on a wharf or in a coal yard would be regarded for legal purposes as Pennsylvania land. But where the contract relates to coal buried in the earth and forming part of it, and the right to it is exclusive in the grantee, it must for legal purposes be regarded as real estate. *Genet v. Delaware, etc., Canal Co., (1895) 13 Misc. 409, 35 N. Y. S. 147, reversed on other grounds 1 App. Div. 631, 37 N. Y. S. 610, affirmed (1890) 122 N. Y. 505.*

Fixtures.—Fixtures have been defined to be "articles which have an existence independent of a freehold, and are afterwards annexed to and become a part of it." *Hamilton v. Austin, (1885) 36 Hun 138.* The word "land" when used in a deed includes not only the naked earth, but everything within it, and the trees, fixtures and fences upon it. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed, but pass to the grantee unless the reservation is in writing. "Trees, buildings, fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seizure, like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and therefore it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted." *Mott v. Palmer, (1848) 1 N. Y. 564.*

Fruit.—A person upon whose lands a tree wholly stands is the owner of the whole thereof, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another. *Hoffman v. Armstrong*, (1872) 48 N. Y. 201, 8 Am. Rep. 537, affirming 46 Barb. 337.

Church pew.—Owners of pews have an exclusive right to their possession and occupation for the purposes of public worship; not as an easement, but by virtue of their individual right of property therein, derived perhaps, in theory at least, from the corporation represented by the trustees who are seized and possessed of the temporalities of the church. The owners hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold. These rights are distinct and separate; and neither do they, nor the respective possessions growing out of the enjoyment of them, necessarily conflict with each other. "The remedy by an action of trespass for a disturbance of the owner in the possession of his pew is therefore entirely consistent with established principles, and, indeed, seems to be the most appropriate one that can be brought." *Shaw v. Beveridge*, (1842) 3 Hill 26, 38 Am. Dec. 616. To the same effect see *Matter of Reformed Dutch Church*, (1853) 16 Barb. 237; *Voorhees v. Amsterdam Presbyterian Church*, (1849) 8 Barb. 135, affirmed (1853) 17 Barb. 103; *Baptist Church v. Witherell*, (1832) 3 Paige 296. Therefore the interest of one in a pew, although limited and qualified, is an interest in real estate. *Ithaca First Baptist Church v. Bigelow*, (1836) 16 Wend. 28; *Vielie v. Osgood*, (1849) 8 Barb. 130; *Foote v. West*, (1845) 1 Denio 544; *Freligh v. Platt*, (1826) 5 Cow. 494; *McNabb v. Pond*, (1856) 4 Bradf. 7.

ARTICLE 2

TENURE OF REAL PROPERTY

- Section 10.** Capacity to hold real property.
11. Capacity to transfer real property.
 12. Deposition of resident alien. [Repealed]
 13. When and how alien may acquire and transfer real property. [Repealed]
 14. Effect of woman's marriage with alien. [Repealed]
 15. Title through alien.
 16. Liabilities of alien holders of real property.
 17. Heirs of patriotic Indian.
 18. Mines in Saint Lawrence county.

§ 10. Capacity to hold real property. 1. A citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase.

2. Alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native-born citizens and their heirs and devisees take in the same manner as citizens; provided, however, that nothing herein contained shall affect the rights of this state in any action or proceeding for escheat instituted before May nineteenth, eighteen hundred and ninety-seven.

This section was derived from the Real Property Law of 1896, § 2, and from L. 1897, ch. 593, § 1, subdivision 2 coming from the last cited statute. It was amended by L. 1913, ch. 152, § 1. This amendment affected subdivision 2, and substituted the first part of the subdivision down to the semicolon in place of the former reading, which was as follows: "Any citizen of a state or nation which, by its laws, confers similar privileges on citizens of the United States, may take, acquire, hold and convey lands or real estate within this state, in the same manner and with like effect as if such person were, at the time, a citizen of the United States;"

I. Generally.

II. Capacity of aliens.

I. GENERALLY

Prohibition as to restraints on alienation: see CONSTITUTION, art. 1, § 14.
Constitutional provision as to allodial tenure: see CONSTITUTION, art. 1, § 12.

Escheats and escheated lands: see CONSTITUTION, art. 1, § 10; PUBLIC LANDS LAW, § 60 et seq. *Action for land escheated:* see Code Civ. Pro., § 1977 et seq.

Power of native Indian to take, hold and convey real property: see INDIAN LAW, § 2.

L. 1913, ch. 152, § 2, repealed sections 12, 13, and 14 of this chapter, and L. 1913, ch. 153, § 1, repealed section 13 of the Decedent Estate Law, which dealt with devises of real property to aliens.

Acquisition of additional real property by corporation: see GENERAL CORPORATION LAW, § 13. **Acquisition of real property by foreign corporation:** see GENERAL CORPORATION LAW, §§ 20, 21. **Power of joint-stock association to take and convey real property:** see JOINT-STOCK ASSOCIATION LAW, § 6. **Possession of and title to real estate by turnpike, plank-road and bridge corporations:** see TRANSPORTATION CORPORATIONS LAW, § 125. **Restrictions on holding real estate: by banks,** see BANKING LAW, § 107; **by private bankers,** see BANKING LAW, § 164; **by trust companies,** see BANKING LAW, § 189; **by savings banks,** see BANKING LAW, § 240; **by savings and loan associations,** see BANKING LAW, § 387.

Power of certain receivers to hold real property: see Code Civ. Pro., § 716. **Power of corporate receiver to hold real property:** see GENERAL CORPORATION LAW, § 243. **When property of judgment debtor is vested in receiver on supplementary proceedings:** see Code Civ. Pro., § 2468.

Rights and powers of married women in real property: see DOMESTIC RELATIONS LAW, §§ 50, 51.

Purchase and acquisition of land by the United States: see STATE LAW, § 50 et seq.

Capacity to take and execute a power: see *infra*, § 141. **Capacity to take under a power:** see *infra*, § 179.

Condemnation of realty: constitutional provision, see CONSTITUTION, art. 1, § 7; **procedure,** see Code Civ. Pro., § 3357 et seq.; **by pipe line corporations,** see TRANSPORTATION CORPORATIONS LAW, § 42; **by waterworks corporations,** see TRANSPORTATION CORPORATIONS LAW, § 84; **by tramway corporations,** see TRANSPORTATION CORPORATIONS LAW, § 32; **by railroads,** see RAILROAD LAW, § 8; **condemnation for drainage purposes,** see DRAINAGE LAW, §§ 18, 72.

Grounds of escheat.—There are two cases in which lands escheat: First, where the owner in fee dies seized, leaving no heir capable of inheriting the property, and making no valid disposition of it by will; and second, where lands are purchased by an alien, who cannot hold as against the state. In both of these cases the property immediately reverts to, and vests in, the people as the original and ultimate proprietors of all the lands within the state. If there is an outstanding life estate, the people will not be entitled to the possession until that estate has terminated; but this cannot affect their title to the fee. *People v. Conklin*, (1841) 2 Hill 67. And the title of the state, by escheat, cannot be divested by subsequent naturalization of an alien heir or widow, unless our own statutes on the subject so provide. *Heney v. Brooklyn Benev. Soc.*, (1868) 39 N. Y. 333. As to property subject to escheat generally, see Ann. Cas. 1912D 382 note. As to presumption and burden of proof to establish escheats, see Ann. Cas. 1913E 383 note. As to right of state to contest will so as to establish escheat, see 2 L. R. A. (N. S.) 643 note. As to liability of lands held by corporations to escheat, see 12 L. R. A. 531 note. As to termination of right to declare escheat by death of alien or transfer in his lifetime, see 9 L. R. A. (N. S.) 186.

When title does not escheat.—Title does not escheat to the state where there is a naturalized heir who can inherit. *Leary v. Leary*, (1874) 50 How. Pr. 122. So, where a patentee was an alien, but left natural born descendants, it was held that they were entitled to take by inheritance, and escheat would be defeated. *Jackson v. Elz*, (1826) 5 Cow. 314. Where a mortgagor dies without heirs capable of inheriting, the lands escheat to the state subject to the mortgage, but, as the state cannot be sued without its consent, the courts obtain no jurisdiction in an action of foreclosure as against the state, even though the attorney-general is made a party defendant, and under such circumstances the title of the state is not divested by the sale on foreclosure, and, if the statute of limitations has not run against the state, the purchaser's title is not marketable. *Seitz v. Messerschmitt*, (1907) 117 App. Div. 401, 102 N. Y. S. 732, affirmed without opinion (1907) 188 N. Y. 587, 81 N. E. 1175. See also *Lowenfeld v. Ditchett*, (1906) 114 App. Div. 56, 99 N. Y. S. 724.

Construction of act releasing escheat.—Where a release act, entitled "An act for the relief of the heirs at law of William C. Herring, deceased" (L. 1864, ch. 191), was relied upon to establish the contention that the state had released its title, it was held that as the act was clearly a private one, its purpose had to be expressed in its title (Constitution, art. 3, § 16). The court said: "The absence from the title of the name of the person whose decease

effected the forfeiture was clearly misleading, and by this omission the real object of the act is not described in the manner commanded by the organic law for the purpose of guarding against the evils and mischief which might otherwise arise," and the act was held not to have been a valid disposition by the state of the property which escheated to it, and any devise or conveyance made by persons claiming thereunder was void. *Kelly v. Pratt*, (1903) 41 Misc. 31, 83 N. Y. S. 636.

Application of subdivision 1.—This subdivision regulates the taking and holding of real property, and applies only to citizens. *Haley v. Sheridan*, (1905) 107 App. Div. 17, 94 N. Y. S. 864.

II. CAPACITY OF ALIENS

Inheritance from aliens: see DECEDENT ESTATE LAW, § 95.

Wills of certain nonresidents or aliens: see DECEDENT ESTATE LAW, §§ 23-25.

Federal legislation concerning the holding and owning of real estate by aliens: see Act of Congress of March 2, 1892, ch. 363, 29 U. S. Stat. L. 618; 1 Fed. Stat. Ann. (2d ed.) 363, tit. *Aliens*.

Incapacity of alien to serve as executor, administrator, testamentary trustee or guardian, and power to act after removal of disability: see Code Civ. Pro., §§ 2564, 2626.

Right of alien to acquire title by adverse possession: see 21 Ann. Cas. 981 note.

Right of alien to take as tenant by curtesy: see 7 Ann. Cas. 504 note; 7 L. R. A. (N. S.) 659 note.

Right of alien with respect to inheritance as affected by treaty: see Ann. Cas. 1912A 100 note; L. R. A. 1915E 327 note.

Estoppel of grantor to deny title of alien on ground that latter cannot hold property: see 13 Ann. Cas. 532 note.

Property of alien enemies: see Ann. Cas. 1917C 189 note.

Right of alien to locate mine: see 7 L. R. A. (N. S.) 813 note. *Effect of war on contract with alien enemies:* see L. R. A. 1917C 662 note.

Common law rule.—Under the common law, resident or nonresident aliens could not take by inheritance, but they could take by purchase or devise and hold the fee until "office found" or the state asserted its rights to ownership by escheat and as against all others the title by grant or devise was good. During the life of the alien purchaser, the people could not enter without judicial proceedings. His entry and possession and holding were lawful and could be terminated only by regular legal proceedings for the purpose of ascertaining whether he was an alien or not, but when he died the title instantly and of necessity without any inquest of facts escheated and vested in the state because the freehold could not be kept in abeyance and because he was incompetent to transmit by hereditary descent. "In other words, the necessity which existed during the life for legal proceedings by which to judicially determine the alienage of the holder and the right of escheat by the state ceased upon death and the title reverted upon the facts as they actually existed without any judicial determination of them." *McCormack v. Coddington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 741, 96 N. Y. S. 571. To the same effect see *Marx v. McGlynn*, (1882) 88 N. Y. 357, affirming 25 Hun 449; *Hall v. Hall*, (1880) 81 N. Y. 130, affirming 13 Hun 306; *Goodrich v. Russell*, (1870) 42 N. Y. 177; *Munro v. Merchant*, (1863) 28 N. Y. 9, reversing 26 Barb. 383; *Jackson v. Adams*, (1831) 7 Wend. 367; *Eittenheimer v. Heffernan*, (1873) 66 Barb. 374; *Mooers v. White*, (1822) 6 Johns. Ch. 360; *Hamlin v. People*, (1913) 155 App. Div. 680, 140 N. Y. S. 643; *Smith v. Smith*, (1902) 70 App. Div. 286, 74 N. Y. S. 967; *Nolan v. Command*, (1886) 11 Civ. Pro. 295; *Kilfoxy v. Powers*, (1884) 3 Denio 198. But it has been held that the condition of holding as against the state is a question solely between the state and the heir or devisee; as against all the world other than the state the title vests without precedent or subsequent condition, and as to the state the heir or devisee may hold until "office found" and escheat is declared. *Parker v. Linden*, (1889) 113 N. Y. 28, 20 N. E. 858, 861, reversing 44 Hun 518, 9 N. Y. St. Rep. 305; *Smith v. Smith*, (1902) 70 App. Div. 286, 74 N. Y. S. 967; *Maynard v. Maynard*, (1885) 36 Hun 227.

Effect of Real Property Law of 1896.—When the Real Property Law of 1896 (L. 1896, ch. 547) was enacted, "all prior statutes in any way relating to aliens taking, holding, conveying and transmitting real property were repealed." *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119.

Statutory rule.—Under this section certain aliens may take, acquire, hold and convey lands or real estate within this state in the same manner and with the like effect as if such persons were at the time citizens of the United States. The privileges conferred by this act are matters of comity and in no way dependent upon the intention of the alien; and an alien holding real property pursuant to the privileges conferred by the section does so independently of the power of the state to take it from him. "He, like a citizen of this country, can acquire the absolute fee of the land. He, holding his title in the same manner and with like effect as a citizen of the United States, has a title which is the subject of transmission at the moment of death. He is put upon the same footing as a citizen and if he does not convey or devise his real property it is not forfeited and escheated, but passes to his heirs at law under our statutes." *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119. But an alien, apart from the authority of some statute, cannot transmit property by hereditary descent, as he has no title which is the subject of transmission at the moment of death. *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119; *McCormack v. Coddington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 741, 96 N. Y. S. 571.

Retroactive effect of section.—It has been held that chapter 593 of the Laws of 1897 did not have any retroactive effect, and therefore could not be invoked by successors in interest of persons whose estates had escheated prior to its passage. *Stewart v. Russell*, (1904) 91 App. Div. 310, 86 N. Y. S. 625, affirmed without opinion (1906) 184 N. Y. 601, 77 N. E. 983. *Op. Atty.-Gen.* (1905) 563.

Legislative power over descents.—It has never been doubted that the legislature has power to alter or abolish the law of descents. *Kennedy v. Wood*, (1838) 20 Wend. 230.

When capacity to take by descent must exist.—As the capacity of an alien to take by descent must exist at the time when the descent occurs, the statute measures all his rights in this respect, and whatever right he has must be determined thereunder. *Heney v. Brooklyn Benev. Soc.*, (1868) 39 N. Y. 333; *Stewart v. Russell*, (1904) 91 App. Div. 310, 86 N. Y. S. 625, affirmed without opinion (1906) 184 N. Y. 601, 77 N. E. 983; *Stappenbeck v. Mather*, (1911) 73 Misc. 434, 133 N. Y. S. 482; *People v. Conklin*, (1841) 2 Hill 67.

Inheritance through aliens.—If some persons who answer the description of heirs-at-law are incapable of taking by reason of their alienage, they are disregarded and the whole title vests in those heirs competent to take, provided they are not compelled to trace their inheritance through an alien; and where a person dies leaving issue who are aliens, the latter are not deemed the heirs-at-law, for they have no inheritable blood, and the estate descends to the next of kin who have inheritable blood in the same manner as if no alien issue were in existence. *Luhrs v. Eimer*, (1880) 80 N. Y. 171, affirming 15 Hun 399; *Douglas v. Douglas*, (1911) 70 Misc. 412, 128 N. Y. S. 913; *Orser v. Hoag*, (1842) 3 Hill 79; *Jackson v. Jackson*, (1810) 7 Johns. 214. See also *DECEASED ESTATE LAW*, § 95.

Effect of omission of word "transmit."—This section, as it stood prior to its amendment by L. 1913, ch. 152, provided that when a nation by its laws conferred a privilege on citizens of the United States to take, acquire, hold, and convey lands within such foreign state, then the state of New York gave to citizens of such foreign state the right to take, acquire, hold, and convey lands within this state in the same manner and with the same effect as if such persons were at the time citizens of the United States. By virtue of this provision it was held that the citizens of such foreign state became seized of or entitled to the lands which, under this provision, they had acquired, and such persons acquired, under section 11, power to transfer such estate or interest. The fact that the word "transmit" was not included in the section was held not intended to limit the interest of a citizen of a foreign state to merely holding and conveying, but that the wording of the section included the right to transmit by inheritance. *Haley v. Sheridan*, (1905) 107 App. Div.

17, 94 N. Y. S. 864. And it was held that the words "purchase and take a conveyance of real estate," as used in an early statute relating to this subject, excluded from the operation of section 4 of the statute of 1845 (as amended by L. 1875, ch. 38) lands acquired by descent. *Stewart v. Russell*, (1904) 91 App. Div. 310, 86 N. Y. S. 625, affirmed without opinion (1906) 184 N. Y. 601, 77 N. E. 983; *Callahan v. O'Brien*, (1893) 72 Hun 216, 25 N. Y. S. 410, 55 N. Y. St. Rep. 201.

Right of alien to hold as trustee.—The right given to devise includes the right to do so upon such trusts as our laws permit, and the citizenship of the beneficiary does not appear to be material where the legal title is vested in the trustees. It has been held that where the trustees are citizens active trusts for the benefit of aliens, if otherwise lawful, are valid, and there is no express regulation of the right of an alien to take and hold as trustee. The reason given for permitting an alien to take the beneficial use is that the title to the land is still within the control of the state; it being in the hands of citizen trustees who owe allegiance to our government and can be called upon to discharge the duties of citizenship. But where this control is expressly abandoned, where our law permits the title to be held by an alien outright, there is no reason why such alien should not hold as trustee. *Wainwright v. Low*, (1892) 133 N. Y. 313, 30 N. E. 747; *Marx v. McGlynn*, (1882) 88 N. Y. 357, affirming 25 Hun 449; *Cumberland v. Graves*, (1852) 7 N. Y. 305, affirming 9 Barb. 595; *Hayden v. Sugden*, (1905) 48 Misc. 108, 96 N. Y. S. 681.

Devise to alien trustees.—A devise to alien trustees of lands held by an alien under the Act of 1798, "to enable aliens to purchase and hold real estate within this state" (L. 1789, ch. 72), was held valid. *Howard v. Moot*, (1876) 64 N. Y. 262, affirming 2 Hun 475, 5 Thomp. & C. 89.

Resulting trust in favor of alien.—In an early case it was held that where an alien, for the purpose of evading the law, purchased land and took a conveyance thereof in the name of a third person without any written declaration of trust, a resulting trust did not arise in favor of the purchaser, as equity would never raise a resulting trust in fraud of the rights of the state or of the laws of the land. *Leggett v. Dubois*, (1835) 5 Paige 114.

Rule as to personality.—There is no disability on the part of aliens with respect to sharing in the personality of a decedent. *Heller v. Teale*, (1914) 216 Fed. 387.

Age of majority.—By the common law the age of majority is fixed at twenty-one for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant; and the same limit applies as to aliens. *Ex parte Petterson*, (1908) 166 Fed. 536.

Effect of special act.—An early special act of the legislature, enabling an alien to acquire, hold, and alienate real estate in like manner as a natural born citizen, was held to invest him with inheritable blood and to clothe him with the power of transmitting his estate to his next of kin, so that dying intestate his estate would descend the same as that of a citizen by birth, and would not, therefore, escheat, provided an heir capable of taking by descent could be found. *Parish v. Ward*, (1855) 28 Barb. 328.

Presumption as to citizenship.—Where there is no proof that a person has denaturalized himself or ceased to be a citizen and subject of a foreign power, his original citizenship is presumed to have continued. *Hauenstein v. Lynham*, (1879) 100 U. S. 483, 25 U. S. (L. ed.) 628; *Charles Green's Son v. Solas*, (1887) 31 Fed. 106.

Right of citizenship.—It is the inherent right of every independent nation to determine for itself and according to its own constitution and laws what persons shall enjoy the rights and privileges of citizenship, and the fourteenth amendment of the Federal Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." In *re Buntaro Kumagai*, (1908) 163 Fed. 922. The question, "who are citizens of the United States," must depend upon the laws of the United States. *Ludlam v. Ludlam*, (1863) 26 N. Y. 356, 84 Am. Dec. 193, affirming 31 Barb. 486. And the United States Revised Statutes, section 1992 (2 Fed. Stat. Ann., [2nd ed.] 115) provides that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." State laws and state legislation could not in the nature of things be permitted to define, abridge or enlarge the important privilege of

citizenship in the United States. It is purely a national right, and one which must be governed by rules operating alike upon every part of the Union. *Lynch v. Clarke*, (1844) 1 Sandf. Ch. 583. But whatever rights aliens have or may acquire in real estate within a state depends upon its own legislation, and not upon the fact that naturalization operates per se to give the rights of a native born citizen, by relation, back to the birth of the subject. *Heney v. Brooklyn Benev. Soc.*, (1868) 39 N. Y. 333.

Change of domicile as affecting citizenship.—A citizen of the United States resident in one state is in no sense whatsoever an alien or foreigner in respect to citizens of other states. "Citizenship of the United States carries with it such constitutional guaranties that what is now known as citizenship of a state is acquired by mere residence at the volition of the individual. No additional naturalization is required, nor is any oath of allegiance necessary, so that a change of citizenship from one state to another is merely a change of domicile." *People v. Plimley*, (1896) 17 Misc. 457, 41 N. Y. S. 365, affirmed without opinion (1896) 150 N. Y. 571, 44 N. E. 1128.

Divestment of citizenship.—One cannot divest himself of his citizenship until he becomes the citizen of another government, and this he cannot do until he arrives at full age, and therefore it has been held that where a citizen of the United States went to Peru at the age of eighteen years, with the intention of indefinite continuance there for the purpose of trading, but took no steps to be naturalized in the country or to indicate an intention of a permanent change of domicile, otherwise than as stated, a child born to him in Peru of a wife, a native of that country, was a citizen of the United States. *Ludlam v. Ludlam*, (1863) 26 N. Y. 356, 84 Am. Dec. 193, affirming 31 Barb. 486.

Retroactive effect of naturalization.—Naturalization, by virtue of the laws of the United States, has no retroactive operation to vest or confirm in the subject, the title to lands which, by reason of his alienage, he could not inherit at the time of the death of the ancestor. *Heney v. Brooklyn Benev. Soc.*, (1868) 39 N. Y. 333.

Effect of deed to citizen wife and alien husband.—In an early case it was held that a deed to a citizen wife and an alien husband vested the whole estate at once in the wife, as they were not tenants in common or joint tenants, but were one person in law, in effect constituting but one grantee, so that the wife must take the whole if the husband was incapable of holding with her. *Wright v. Saddler*, (1859) 20 N. Y. 320.

Status of children born in United States of foreign parents.—"That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, become citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the Constitution, when the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. *Lynch v. Clarke*, (1844) 1 Sandf. Ch. 583." *United States v. Wong Kim Ark*, (1898) 169 U. S. 649, 18 S. Ct. 456, 42 U. S. (L. ed.) 890. See also *Pang Shu Yim v. United States*, (1907) 154 Fed. 660, 83 C. C. A. 484. And a person born in this country of alien Chinese parents who are permanently domiciled here, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry. *United States v. Wong Kim Ark*, (1898) 169 U. S. 649, 18 S. Ct. 456, 42 U. S. (L. ed.) 890; *United States v. Leung Sam*, (1902) 114 Fed. 702; *In re Look Tin Sing*, (1884) 21 Fed. 905. But the naturalization of the father does not change the status of children born out of the limits and jurisdiction of the United States, where their father, at the time of their births, is not a citizen thereof. *United States v. Williams*, (1904) 132 Fed. 894.

Foreign born children of American parents.—Children of United States citizens who have never renounced their citizenship are citizens of the United States, though born in a foreign country. *Ware v. Wisner*, (1883) 50 Fed. 310.

Expatriation.—The department of government which, in the distribution of authority under the Constitution, has power over the subject of naturalization, has it also over the subject of expatriation. The Federal Constitution is silent on the subject of expatriation; but article 1, § 8, par. 4, provides that "Congress shall have power to establish a uniform rule of naturalization." Where the Constitution is thus silent as to who can denationalize, that department which can nationalize must be held to have authority to expatriate.

Expatriation must be effected by removal from the country. *Boyd v. Nebraska*, (1891) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103; *Comitis v. Parker*, (1893) 56 Fed. 556. It is the policy of our government that the right of expatriation is a natural and inherent right of all people, and it is not necessary to have assent on the part of the government renounced. *Jennes v. Landes*, (1897) 84 Fed. 73.

Effect of treaty.—A treaty, by virtue of the Federal Constitution, is a part of the supreme law of the land, and supersedes all local statutes that contravene its provisions. Its effect is to put all alien persons described therein, in respect to the rights it secures them, precisely upon the same footing as citizens of the United States or subjects of the kingdom in which the question arises. *Kull v. Kull*, (1885) 37 Hun 476; *Matter of Beck*, (1890) 2 Connoly 355, 11 N. Y. S. 199, 31 N. Y. St. Rep. 965; *Wieland v. Renner*, (1883) 65 How. Pr. 245. And treaties must if possible be liberally construed, having in view the legislation in regard to them and the executive acts under them of the high contracting parties, so in a case of doubt they should be interpreted according to international law. An attempt should be made to reconcile treaties with our federal laws, but the fact that a treaty cannot be reconciled with state law affords no reason why the treaty should not be enforced by a state court. *Matter of Lobrasciano*, (1902) 38 Misc. 415, 77 N. Y. S. 1040. As was said in *Hauenstein v. Lynham*, (1879) 100 U. S. 483, 25 U. S. (L. ed.) 628: "It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution." But it has been held that the laws of a foreign country will not be judicially noticed by the courts of this state, and are to be proved as is any other fact in a case. *Douglass v. Douglass*, (1911) 70 Misc. 412, 128 N. Y. S. 912.

As to treaties concerning right of foreign consuls to administer estates of their nationals, see *Ann. Cas. 1913D 654* note; *Ann. Cas. 1916D 237* note.

British subject.—Prior to the amendment of this section by L. 1913, ch. 152, it was held that a citizen of the Kingdom of Great Britain and Ireland, which had conferred privileges similar to those of this section on citizens of the United States, by the Naturalization Act (33, 34 Vic. ch. 14; May 12, 1870), might take, acquire, hold, and convey lands or real estate within this state, in the same manner and with like effect as if said person were a citizen of the United States. *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119; *Hayden v. Sugden*, (1905) 48 Misc. 108, 96 N. Y. S. 681; *Fay v. Taylor*, (1900) 31 Misc. 32, 63 N. Y. S. 572; *Op. Atty-Gen.* (1908) 526.

French citizen.—In *Geofroy v. Riggs*, (1890) 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642, it was held that a citizen of France could take by inheritance an interest in real property in the District of Columbia of which his ancestor, a citizen of the United States, died seized.

Citizens of Ontario.—In *Op. Atty-Gen.* (1901) 163, it was ruled that citizens of the Province of Ontario, of the Dominion of Canada, might take, hold and convey real property situated in this state.

Construction of early statutes.—Under the former provisions of the Act of 1874 (ch. 261, Laws of 1875), amending the Act of 1846 (ch. 115, Laws of 1845), in reference to aliens taking and holding lands in this state, which provided that if an alien resident or a naturalized or native citizen had died or should thereafter die holding a conveyance of lands in the state, purchased by such person, and "leaving persons who would answer the description of heirs," such persons, whether citizens or aliens, might take and hold the lands as heirs, it was held that the state surrendered its title to lands acquired by escheat previous to the passage of the act, of which it had not before that time assumed in any manner to make disposition, where the person to whose title the state so succeeded died leaving alien heirs. *Wainwright v. Low*, (1892) 132 N. Y. 313, 30 N. E. 747, affirming 57 Hun 386, 10 N. Y. S. 888.

The words "resident alien," in the provision of the Act of 1845 "to enable resident aliens to take and hold real estate" (§ 4, ch. 115, Laws of 1845), which enabled those answering the description of heirs of a deceased alien resident to take, whether they were citizens or aliens, were held not to include or designate a naturalized citizen, and the incapacity therefore of alien heirs of a naturalized citizen, who died intestate, to take lands of which he died

seized, was not removed by that statute. *Luhrs v. Eimer*, (1880) 80 N. Y. 171, affirming 15 Hun 399. And the Act of 1845 did not operate to confirm a title previously conveyed by an alien heir of one holding real estate. *Brown v. Sprague*. (1848) 5 Denio 545.

For a brief review of the statutes relating to the capacity of aliens to take and transmit real estate, see *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119; *McCormack v. Codrington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 741, 96 N. Y. S. 571; *Smith v. Reilly*, (1900) 31 Misc. 701, 66 N. Y. S. 40.

§ 11. Capacity to transfer real property. A person other than a minor, an idiot, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest.

This section was derived from Real Property Law of 1896, § 3.

Creation of future and contingent estates: see *infra*, § 50.

Conditional limitations: see *infra*, § 53.

When expectant estates are defeated: see *infra*, § 57.

When estate for life or years is changed into a fee: see *infra*, § 149.

When written conveyance necessary: see *infra*, § 242.

When grant takes effect: see *infra*, § 244.

Estate which passes by grant: see *infra*, § 245.

Effect of conveyance where property is leased: see *infra*, § 248.

Covenants not implied and construction of covenants in grants of freehold interests: see *infra*, §§ 251, 253.

Construction of grant of appurtenances and of all rights and estate of grantor: see *infra*, § 255.

Short forms of deeds: see *infra*, § 258.

When contract to sell is void: see *infra*, § 259.

Conveyances with power to revoke, determine or alter: see *infra*, § 267.

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III. Transfers by persons of unsound mind, 26

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I. IN GENERAL

Terms "estate" and "interest in real property": see *infra*, § 240.

Suspension of power of alienation: see *infra*, § 42.

Capacity to grant a power: see *infra*, § 139. *Creation of a fee by certain powers:* see *infra*, § 150. *When grantee of power has absolute fee:* see *infra*, § 151.

Conveyance by tenant for life or years of greater estate than possessed: see *infra*, § 247.

Conveyances with intent to defraud purchasers, incumbrancers and creditors: see *infra*, §§ 262, 263.

Restrictions on conveying real estate by savings banks: see *BANKING LAW*, § 240. *Savings and loan associations:* see *BANKING LAW*, § 387.

Lease, mortgage or sale of corporate real property: see *GENERAL CORPORATION LAW*, § 70 et seq.

Power of judge to enjoin transfer of property in supplementary proceedings: see *Code Civ. Pro.*, § 2451.

Proceeding to mortgage, lease or sell real estate of joint-stock association: see *JOINT-STOCK ASSOCIATION LAW*, § 8.

Who may devise real estate: see *DECEDENT ESTATE LAW*, § 10.

Power of native Indians to convey real property: see *INDIAN LAW*, § 2.

Source of section.—In the revised edition of the statutes of this state (by Jones and Varrick), in 1787, such parts of those English statutes as were deemed applicable to our policy were collected and consolidated in an "act concerning tenures." The object of the statute was not to alter the law, but to adopt, in express terms, such of the English statutes relating to tenures

as were deemed to be in force here. "It was at that era, when our legislature drew the line of discrimination, and either re-enacted or repealed all the British statutes that extended to the colony of New York." *Jackson v. Schutz*, (1820) 18 Johns. 174, 9 Am. Dec. 195.

Application of section.—This section provides for the capacity to transfer real property, and applies to all persons other than minors, idiots or persons of unsound mind. Thus, any person who is legally seized of or entitled to an estate or interest in real property has authority to transfer such estate or interest. This provision seems to have been taken from the Revised Statutes (1 R. S. 719, § 10), which provided that a person capable of holding lands other than a minor, etc., who was seized of or entitled to any estate or interest in lands, might alien the same; but the words "capable of holding lands" were omitted on the revision, "so that now any person other than a minor or idiot or person of unsound mind who is seized of or entitled to an estate or interest in real property may transfer such estate or interest." *Haley v. Sheridan*, (1905) 107 App. Div. 17, 94 N. Y. S. 864.

Meaning of term "seized."—The owner of a fee simple estate in possession in land has all the property therein of which the thing is susceptible. Such an owner is sometimes said to be seized of the land, but which only means that the entire property of the land is in him; or, in other words, that he is seized in fact of a fee simple estate therein. So one who has an estate for life, but not in fee in land, although owner of a part only of the entire property, is also said to be seized of the land itself. These, however, are but forms of speech, and are not strictly accurate; the term *seizin*, as already stated, has reference to the estate of the person seized, and not to the thing in which such estate exists. It is applicable to freehold estates only, for a person is said to be possessed, not seized, of any less estate. The *seizin* is of the estate, and according to its quality and quantity. The estate may be present or future in point of enjoyment, for there may be a *seizin* of each; as it also may be in fee simple, or fee tail, where such estates are not prohibited, or for life. *Van Rensselaer v. Poucher*, (1847) 5 Denio 35; *Vanderheyden v. Crandall*, (1846) 2 Denio 9, affirmed (1848) 1 N. Y. 491.

It has been held that the word "seized" is equivalent to the word "owning." *Dodge v. Stevens*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443. "Seizin denotes, ordinarily, a possession in fact by one having or claiming a freehold interest, which is known as a *seizin* in deed, or a right of immediate possession, which is a *seizin* in law. There may be a constructive *seizin*, the equivalent of a *seizin* in deed." *Jenkins v. Fahey*, (1878) 73 N. Y. 355, reversing 11 Hun 351.

Right to impose covenants and restrictions.—The owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character. *Cowell v. Springs Co.*, (1879) 100 U. S. 55, 25 U. S. (L. ed.) 547; *St. Stephen's Protestant Episcopal Church v. Church of Transfiguration*, (1908) 59 Misc. 560, 112 N. Y. S. 403, reversed on other grounds 130 App. Div. 166, 114 N. Y. S. 623. See also *Flynn v. New York, W. & B. Ry. Co.*, (1916) 218 N. Y. 140; *Gallon v. Hussar*, (1916) 172 App. Div. 393, 158 N. Y. S. 895. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, distilleries, livery stables, tanneries, machine shops, and the manufacture and sale of intoxicating liquors have, in a multitude of instances, been excluded from particular localities. *Cowell v. Springs Co.*, (1879) 100 U. S. 55, 25 U. S. (L. ed.) 547.

But a public service corporation cannot, by means of a restrictive covenant, be kept entirely off the premises; they may enter the exclusive district upon making just compensation for the property rights thus taken or destroyed. *Flynn v. New York, W. & B. Ry. Co.*, (1916) 218 N. Y. 140, 112 N. E. 913.

II. TRANSFERS BY MINORS

Who are infants.—By the common law the age of majority is fixed at twenty-one for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant. Ex p. Petterson, (1908) 166 Fed. 536. Under the Domestic Relations Law, the age of majority is fixed at twenty-one years. See DOMESTIC RELATIONS LAW, § 2. As to time of arriving at specified age, see 17 Ann. Cas. 906 note; 19 Ann. Cas. 269 note; 16 L. R. A. 542 note.

A conveyance by an infant is an assertion of his right to convey, and a contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted, but he can no more do that effectively than he can make the contract alleged to be confirmed. MacGreal v. Taylor, (1896) 167 U. S. 688, 17 S. Ct. 91, 42 U. S. (L. ed.) 326; Sims v. Everhardt, (1880) 102 U. S. 300, 26 U. S. (L. ed.) 87; Alfrey v. Colbert, (1909) 168 Fed. 231, 93 C. C. A. 517. As to estoppel of infants by misrepresentation or fraud concerning age, see notes, 4 Ann. Cas. 535; 57 L. R. A. 684; 9 L. R. A. (N. S.) 1117; 16 L. R. A. (N. S.) 672; 19 L. R. A. (N. S.) 1056; 35 L. R. A. (N. S.) 574; 36 L. R. A. (N. S.) 33; 42 L. R. A. (N. S.) 643.

Effect of infant's deed generally.—The conveyances of an infant are voidable only, and not absolutely void. Gillett v. Stanley, (1841) 1 Hill 121; Bool v. Mix, (1837) 17 Wend. 119, 31 Am. Dec. 285; Eagle Fire Co. v. Lent, (1837) 6 Paige Ch. 635; Stafford v. Roof, (1827) 9 Cow. 626; Wetmore v. Kissam, (1859) 3 Bosw. 321; Voorhies v. Voorhies, (1857) 24 Barb. 150.

Deed of infant married woman.—The rule that the deed of an infant is voidable only, and not absolutely void, holds true even though the grantor is a feme covert. Sims v. Everhardt, (1880) 102 U. S. 300, 26 U. S. (L. ed.) 87.

Deed by infant heir.—It has been held that the execution of a deed by an infant, jointly with adult heirs, could not operate to divest him of his title to land acquired under the will of his father. Clapp v. Byrnes, (1898) 155 N. Y. 535, 50 N. E. 277, affirming 3 App. Div. 284, 38 N. Y. S. 1063.

Time of avoidance generally.—It is a general rule that a conveyance by an infant is valid until it is avoided by him after arriving at full age, and that he is entitled to exercise his right of avoidance at any time within the term of the statute of limitations after his majority. Green v. Green, (1877) 69 N. Y. 553, 25 Am. Rep. 233, affirming 7 Hun 492; McMurray v. McMurray, (1876) 66 N. Y. 175; Egan v. Scully, (1898) 29 App. Div. 617, 51 N. Y. S. 680, affirmed without opinion (1902) 173 N. Y. 581, 65 N. E. 1116. But it has been held that an omission to disaffirm a conveyance within a reasonable time after arriving at majority operated as an affirmation thereof. Beardsley v. Hotchkiss, (1884) 96 N. Y. 291; Walsh v. Powers, (1870) 43 N. Y. 23, 3 Am. Rep. 634; Bool v. Mix, (1837) 17 Wend. 119, 31 Am. Dec. 285. "What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case." Sims v. Everhardt, (1880) 102 U. S. 300, 26 U. S. (L. ed.) 87.

As to disaffirmance before majority, see 51 L. R. A. (N. S.) 28 note.

Mode of avoidance.—It has been held that before suit can be brought for the recovery of the possession of lands conveyed in infancy, the grantor must make an entry upon the lands and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, such as demanding possession or giving notice of an intention not to be bound by the first deed. Voorhies v. Voorhies, (1857) 24 Barb. 150.

As to disaffirmance by deed after majority, see 3 Ann. Cas. 593 note; Ann. Cas. 1914D 847 note. As to possession after majority as affirmation of lease, see 47 L. R. A. (N. S.) 547 note. As to essentials of disaffirmance of conditional sale contract, see 52 L. R. A. (N. S.) 723 note.

Implied ratification.—It was said in Egan v. Scully, (1898) 29 App. Div. 617, 51 N. Y. S. 680, affirmed without opinion (1902) 173 N. Y. 581, 65 N. E. 1116: "While the acts of an infant after becoming of age may be such as to warrant an inference that he or she intended to ratify the act done during minority, still the inference to be drawn from such acts depends upon surrounding circumstances."

Acquiescence or delay as ratification.—It has been held that mere delay in taking advantage of the privilege of disaffirmance will not work a waiver or a ratification, and that ratification is a matter of intention and will not be inferred by a bare recognition or a silent acquiescence for any time less than the period of statutory limitation. *Green v. Green*, (1877) 69 N. Y. 553, 25 Am. Rep. 233, affirming 7 Hun 492; *McMurray v. McMurray*, (1876) 66 N. Y. 175; *Eagan v. Scully*, (1898) 29 App. Div. 617, 51 N. Y. S. 680, affirmed without opinion (1902) 173 N. Y. 581, 65 N. E. 1116. And in the absence of an express ratification, it must be shown that the infant, after becoming of age, has accepted the fruits of the unauthorized act, or in some way benefited by it. Mere acquiescence is not sufficient. *Foley v. Mutual Life Ins. Co.*, (1892) 64 Hun 63, 18 N. Y. S. 615, affirmed (1893) 138 N. Y. 333, 34 N. E. 211, 34 A. S. R. 456, 20 L. R. A. 620.

As to ratification by silence or acquiescence generally, see *Ann. Cas.* 1912C 775 note.

Necessity of restoring consideration.—Where a son, during infancy, conveyed his real estate to his father, receiving and expending or wasting the consideration therefor before his arrival at full age, and had no other property with which to replace it, it was held that he could disaffirm his deed after he arrived of age, without restoring or offering to restore the consideration. *Green v. Green*, (1877) 69 N. Y. 553, 25 Am. Rep. 233, affirming 7 Hun 492.

III. TRANSFERS BY PERSONS OF UNSOUND MIND.

Meaning of terms "lunatic" and "lunacy": see *GENERAL CONSTRUCTION LAW*, § 28. *Wills by persons of unsound mind:* see *DECEDENT ESTATE LAW*, § 10 note.

Rule of common law.—By the common law a deed made by a person non compos was voidable only and not void. *Sander v. Savage*, (1902) 75 App. Div. 333, 78 N. Y. S. 189; *Baldwin v. Golde*, (1895) 88 Hun 115, 34 N. Y. S. 587.

Presumption as to sanity.—The legal presumption is that every man is sane, and the burden of proof that he is not rests upon the party alleging it. *Shipman v. Protected Home Circle*, (1903) 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347, modifying 66 App. Div. 448, 73 N. Y. S. 594; *Weed v. Mutual Ben. Life Ins. Co.*, (1877) 70 N. Y. 561, affirming 41 Super. Ct. 476; *Delafield v. Parish*, (1862) 25 N. Y. 9, affirming 1 Redf. 1; *Brown v. Torrey*, (1857) 24 Barb. 583; *Gardner v. Gardner*, (1839) 22 Wend. 526, 34 Am. Dec. 340; *Matter of Flansburgh*, (1894) 82 Hun 49, 31 N. Y. S. 177; *Matter of Lyddy*, (1889) 53 Hun 629 mem., 2 Silv. Sup. 223, 5 N. Y. S. 636, 24 N. Y. St. Rep. 607; *Jones v. Jones*, (1892) 63 Hun 630 mem., 17 N. Y. S. 905, affirmed (1893) 137 N. Y. 610 mem., 33 N. E. 479, 51 N. Y. St. Rep. 75; *Ean v. Snyder*, (1865) 46 Barb. 230; *Matter of Preston*, (1906) 113 App. Div. 732, 99 N. Y. S. 312; *Buchanan v. Belsey*, (1901) 65 App. Div. 58, 72 N. Y. S. 601; *Jackson v. Van Dusen*, (1809) 5 Johns. 144, 4 Am. Dec. 330; *Matter of Vedder*, (1888) 6 Dem. 92, 14 N. Y. St. Rep. 470; *Potter v. McAlpine*, (1885) 3 Dem. 108; *Solley v. Westcott*, (1904) 43 Misc. 188, 88 N. Y. S. 297.

Term "unsound mind."—The term "unsound mind" is synonymous with non compos mentis, and according to Coke and Blackstone embraces four classes of persons: idiots from birth; those who, by accident, grief or sickness, wholly lose their reason or understanding; lunatics; drunkards and those who voluntarily deprive themselves, temporarily, of understanding. *Stanton v. Wetherwax*, (1853) 16 Barb. 259; *Blanchard v. Nestle*, (1846) 3 Denio 37; *Stewart v. Lisenard*, (1841) 26 Wend. 255. Within the meaning of the term "unsoundness of mind," as mentioned in the statutes, the various phases of mental conditions, as defined by the terms "insanity," "mental derangement," "unsoundness," and "monomania," are held by the courts to be within the range of inquiry in determining whether or not a person at the time of executing an alleged will was a person of "unsound mind," and these terms are of such variable significance that their value in any given case will depend entirely upon the relations that they bear to the particular person in connection with the particular act under inquiry, as they simply represent or describe a sliding scale of mental disorder or enfeeblement

expressing different degrees of determination or its absence, mental ability or its absence. The precise line where disability or incapacity commences cannot be defined by the courts by an unvarying rule, and for that reason each case is tested in the light of general rules by the proof and circumstances attending it. *Cheney v. Price*, (1895) 90 Hun 238, 37 N. Y. S. 117.

Standard of mental capacity.—In law, the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the party was *compos mentis* or *non compos mentis*, as those terms are used in their fixed legal meaning. *Delafield v. Parish*, (1862) 25 N. Y. 9, affirming 1 Redf. 1; *White v. Roes*, (1892) 65 Hun 626 mem., 20 N. Y. S. 520, 48 N. Y. St. Rep. 599. However, a sound mind, within the meaning of the law, does not mean a mind perfectly balanced and free from all passion or prejudice. *Phillips v. Chater*, (1882) 1 Dem. 533. And insanity does not render a person incompetent to execute and deliver a valid deed or other instrument, or to transact his own affairs, unless it is so complete as to dominate or affect his every act, or unless the particular transaction is dominated or affected by his insane delusions, so that it does not represent his normal conduct and judgment; but deeds and a contract and release executed by a person of unsound mind will be set aside where it appears that the execution of the papers is so connected with one of the delusions under which he is suffering as to prevent him from exerting a rational act of volition with reference to the matter, although he may appear to be competent to transact ordinary business matters. *Aikens v. Roberts*, (1917) 164 N. Y. S. 502.

Distinction between lunatics and idiots.—A serious distinction has always been recognized between lunatics and idiots, as the one has lucid intervals and the other no mind whatever. The term "lunatic" has broadened to include all insane persons except idiots, and no other distinction seems to be essential. *Bicknell v. Spear*, (1902) 38 Misc. 389, 77 N. Y. S. 920.

Inquisition as evidence of insanity.—It has been held that an adjudication of insanity made on an inquisition is *prima facie* evidence of a defendant's insanity, and the burden is cast upon the plaintiff to show that the act was performed during lucid intervals, or that the inquisition was erroneous. *Van Deusen v. Sweet*, (1873) 51 N. Y. 378; *Hicks v. Marshall*, (1876) 8 Hun 327; *Hoyt v. Adce*, (1870) 3 Lans. 173; *Griswold v. Miller*, (1951) 15 Barb. 520. And it has been held that the presumption, whether conclusive or only *prima facie*, extends to all the world, and includes all persons, whether they have notice of the inquisition or not. *Hughes v. Jones*, (1889) 116 N. Y. 67, 22 N. E. 446, 15 A. S. R. 386, 5 L. R. A. 632; *Hart v. Deamer*, (1831) 6 Wend. 497; *Osterhout v. Shoemaker*, (1842) 3 Hill 513.

Evidence of incapacity generally.—In an action to recover the possession of real property claimed under such deed, the fact of the incapacity of the grantor may be shown, although no fraud is alleged and the incapacity has not legally or judicially been determined at the time of or prior to the execution of the conveyance. *Riggs v. American Tract. Soc.*, (1881) 84 N. Y. 330, reversing 19 Hun 481; *Van Deusen v. Sweet*, (1873) 51 N. Y. 378; *Sander v. Savage*, (1902) 75 App. Div. 333, 78 N. Y. S. 189; *Booth v. Fuller*, (1898) 35 App. Div. 117, 54 N. Y. S. 670; *Goodyear v. Adams*, (1889) 52 Hun 612 mem., 1 Silv. Sup. 185, 5 N. Y. S. 275, affirmed without opinion (1890) 119 N. Y. 650, 23 N. E. 1149.

Conveyance by lunatic as void or voidable.—It has been held that after one has been judicially declared a lunatic, any contract he assumes to make is absolutely void and the presumption of the continuance of the lunacy is conclusive as to all dealings with him until the inquisition has been superseded. The court on the finding of an inquisition establishing lunacy is vested with jurisdiction over the person of the lunatic and assumes the custody and control of his estate, which it manages through the committee appointed in the proceedings, as its bailiff or agent, and although the title of the lunatic to his property is not divested by the proceedings, he can no longer buy or sell, or enter into any contract or dealing binding him or his estate. *Carter v. Beckwith*, (1891) 128 N. Y. 312, 28 N. E. 582; *People v. Tax Com'rs*, (1885) 100 N. Y. 215, 3 N. E. 85, reversing 36 Hun 359; *Matter of Otis*, (1886) 101 N. Y. 580, 5 N. E. 571, affirming 38 Hun 597. And the weight of the earlier cases sustains the proposition that a deed executed by one who has been judicially declared to be a lunatic is absolutely void. *Hughes v. Jones*, (1889) 116 N. Y. 67, 22 N. E. 446, 15 A. S. R. 386, 5

L. R. A. 632; Brown v. Miles, (1891) 61 Hun 453, 16 N. Y. S. 251; Fitzhugh v. Wilcox, (1851) 12 Barb. 235. But in commenting upon the decision in *Van Deusen v. Sweet*, (1873) 51 N. Y. 378, the court in *Aldrich v. Bailey*, (1892) 132 N. Y. 85, 30 N. E. 264, 43 N. Y. St. Rep. 568, reversing 55 Hun 607 mem., 8 N. Y. S. 435, said: "Assuming for the purposes of this case that the rule is there correctly stated, and that a deed would be not merely voidable, but absolutely void when executed by an insane person, yet under the rule in that case a deed is absolutely void only when it appears that the person executing it was at the time so deprived of his mental faculties as to be wholly, absolutely and completely unable to understand or comprehend the nature of the transaction." And in *Blinn v. Schwarz*, (1904) 177 N. Y. 252, 69 N. E. 542, 101 A. S. R. 806, affirming 63 App. Div. 25, 71 N. Y. S. 343, it was declared: "The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect until the option to declare it void is exercised. The right of election implies the right to ratify, and it may be greatly to the advantage of the insane person to have that right. If the deed or contract is void, it binds neither party, and neither can derive any benefit therefrom, but if voidable, the lunatic, upon recovering his reason, can hold on to the bargain if it is good and let go if it is bad. This option is valuable, for it gives him the power to do as he wishes, and to bind or loose the other party at will." In *Sander v. Savage*, (1902) 75 App. Div. 353, 78 N. Y. S. 189, *Hirschberg, J.*, said in this connection: "While the authorities are not entirely harmonious on the question whether the contracts of a lunatic are absolutely void or merely voidable, I think it may be said that where both insanity and the legal presumption of insanity exist, the act of procuring the possession of the property of the lunatic by one having full knowledge of the actual existence of the infirmity, by inducing the execution on the part of the lunatic of a deed, mortgage or other conveyance thereof is a tortious act which neither deprives the grantor of title nor transfers it to the grantee." So, it was held in *Smith v. Ryan*, (1908) 191 N. Y. 452, 84 N. E. 402, 123 A. S. R. 609, 14 Ann. Cas. 505, 19 L. R. A. (N. S.) 461, reversing 116 App. Div. 397, 101 N. Y. S. 1011, that a deed by an incompetent person falls within that class of deeds which may be avoided as fraudulent upon the ground that the party was misled by deception and has never assented to the contract; that the ground on which the deed of an incompetent is avoided is that by infirmity of intellect he is incapable of giving assent; that the element that avoids the deed is lack of assent, and it is not material whether it exists through deceit or through imbecility.

Rule in absence of adjudication of insanity.—Although the decisions of the courts upon the subject are not uniform, according to the weight of authority in this state, as well as elsewhere, the deeds and contracts of a person of unsound mind, who has not been judicially declared incompetent, are voidable and not absolutely void. *Smith v. Ryan*, (1908) 191 N. Y. 452, 84 N. E. 402, 123 A. S. R. 609, 14 Ann. Cas. 505, 19 L. R. A. (N. S.) 461, reversing 116 App. Div. 397, 101 N. Y. S. 1011; *Blinn v. Schwarz*, (1904) 177 N. Y. 252, 69 N. E. 542, 101 A. S. R. 806, affirming 63 App. Div. 25, 71 N. Y. S. 343; *Hughes v. Jones*, (1889) 116 N. Y. 67, 22 N. E. 446, 15 A. S. R. 386, 5 L. R. A. 632; *Valentine v. Lunt*, (1889) 115 N. Y. 496, 22 N. E. 209; *Mutual Life Ins. Co. v. Hunt*, (1890) 79 N. Y. 541, affirming 14 Hun 169; *Ingram v. Baldwin*, (1853) 9 N. Y. 45; *Canfield v. Fairbanks*, (1872) 63 Barb. 461; *Fitzhugh v. Wilcox*, (1851) 12 Barb. 235; *Baldwin v. Golde*, (1895) 88 Hun 115, 34 N. Y. S. 587; *Wagner v. Harriott*, (1887) 10 N. Y. St. Rep. 709; *Merritt v. Merritt*, (1899) 43 App. Div. 68, 59 N. Y. S. 357; *L'Amoureux v. Crosby*, (1831) 2 Paige 422; *Wamsley v. Darragh*, (1895) 12 Misc. 199, 33 N. Y. S. 274, affirmed 14 Misc. 566, 35 N. Y. S. 1075; *Jackson v. Gumaer*, (1824) 2 Cow. 552.

It has been held that a deed or mortgage executed by one who thereafter, by inquisition in proceedings de lunatico, is found to be a lunatic, although made within the period during which he is declared by the finding to have been a lunatic, is not absolutely void, as the adjudication is not absolute evidence of want of capacity, and may be overcome by satisfactory evidence of sanity. *Hughes v. Jones*, (1889) 116 N. Y. 67, 22 N. E. 446, 15 A. S. R. 386, 5 L. R. A. 632; *Banker v. Banker*, (1875) 63 N. Y. 409, affirming 4 Hun 259; *Sander v. Savage*, (1902) 75 App. Div. 353, 78 N. Y. S. 189.

Effect of sale to lunatic.—A sale to a lunatic is invalid when the fact of lunacy existing at the time of the sale is established, whether the seller had or had not knowledge of its existence, but this rule is subject to the qualification that where a sale is for the benefit of the lunatic or his estate, and is made in good faith, without knowledge of his condition, and the party who has made it cannot be put in statu quo, a court of equity will not invalidate the transaction. *Johnson v. Stone*, (1885) 35 Hun 380.

A rule in equity.—"A court of equity, when its jurisdiction is invoked to set aside deeds and contracts of a person, upon the ground of insanity, acts upon equitable principles. It is by no means a matter of course for a court of equity to set aside and declare void the act of a lunatic executed during his lunacy. It does so in no case, except upon equitable terms—upon the universal maxim of that court that he who seeks equity must do equity. As, for instance, where conveyances have been obtained from the lunatic at a great under value, with reason to believe actual fraud on the part of the grantee; yet the amount actually paid must be refunded as a condition of relief." *Canfield v. Fairbanks*, (1872) 63 Barb. 461.

IV. TRANSFERS BY MARRIED WOMEN

Property and powers of married women and authority of husband and wife to convey to each other or make partition: see DOMESTIC RELATIONS LAW, § 50 et seq., and notes thereunder.

Rule at common law.—By the common law a married woman could not convey her lands by deed, either with or without the concurrence of her husband. *Albany Fire Ins. Co. v. Bay*, (1850) 4 N. Y. 9, affirming 4 Barb. 407; *Dickerman v. Abrahams*, (1854) 21 Barb. 551. And as an established doctrine of the common law, in consequence of the unity of person between husband and wife, neither the husband nor the wife could grant, the one to the other, an estate in possession, reversion, or remainder, to take effect in possession during the lifetime of the grantor. *White v. Wager*, (1862) 25 N. Y. 328, affirming 32 Barb. 250; *Shepard v. Shepard*, (1823) 7 Johns. Ch. 57; *Simmons v. McElwain*, (1857) 26 Barb. 419; *Voorhees v. Presbyterian Church*, (1853) 17 Barb. 103. But a conveyance by husband and wife of real estate belonging to her, to a third person, and a reconveyance of the same estate by such third person to the husband, with intent to vest the title in the husband, when the freedom of the wife in the transaction and her capacity were unquestioned, would vest in the husband a valid title to the property granted. *Dempsey v. Tylee*, (1854) 3 Duer 73.

Statutory rule.—Under the statute a married woman may convey her lands, or any interest she may have in lands, by deed duly acknowledged; and such conveyance is valid although her husband does not join therein. *Albany Fire Ins. Co. v. Bay*, (1850) 4 N. Y. 9, affirming 4 Barb. 407; *Dickerman v. Abrahams*, (1854) 21 Barb. 551. The husband has no longer such an interest in his wife's real estate as to require his joinder in her conveyance as at common law. *Hope v. Seaman*, (1909) 119 N. Y. S. 713, judgment modified in other matters 137 App. Div. 86, 122 N. Y. S. 127, which was affirmed (1912) 204 N. Y. 563, 97 N. E. 1106. As said in *Albany County Sav. Bank v. McCarthy*, (1896) 149 N. Y. 71, 43 N. E. 427, the husband's signature to the mortgage added nothing to its effect, "as, since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to lands acquired since the passage of those acts, consists simply of a status, which is never a vested right and is not separately alienable during coverture, but may be modified or annulled at any time before it becomes consummate by the death of the wife."

Power of attorney to convey.—A married woman under her general statutory right to convey as if unmarried may execute a power of attorney authorizing a third person to convey her lands as her agent, or to join in a conveyance of her husband's lands for the purpose of releasing her dower rights. *Platt v. Finck*, (1901) 60 App. Div. 312, 70 N. Y. S. 74, also construing power of attorney and holding it sufficient to authorize the release of the wife's dower rights in a conveyance of her husband's lands. And under the Act of 1878 (L. 1878, ch. 300), authorizing a married woman "to execute, acknowledge and deliver her power of attorney with like force and effect and in the same manner as if she were a single woman," it was

held that she could by such a power appoint her husband her attorney in fact to convey her lands. Accordingly, where a married woman executed a power of attorney to her husband, empowering him to sell and convey all lands belonging to her and to execute in her name "all necessary or proper deeds, consequences, releases, releases of dower and thirds, and rights of dower," for conveying any right, title and interest, whether vested or contingent, chose or accretion," it was held that the husband was authorized to sign the name of his wife to a deed conveying real estate owned by him, and so to release her dower right of dower in the land. *Wronkow v. Oakley*, (1892) 133 N. Y. 595, 31 N. E. 521, 25 A. S. R. 661, 16 L. R. A. 299.

§ 12. Deposition of resident alien. [Repealed.]

This section was repealed by L. 1913, ch. 152, § 2. Section 1 of the same Act amended section 10, supra, and L. 1913, ch. 153, repealed section 13 of the Decedent Estate Law.

As this section stood at the time of its repeal, it read as follows: "An alien who, pursuant to the laws of the United States, has declared his intention of becoming a citizen, and who is, and intends to remain, a resident thereof, may make a written deposition to such facts, before any officer authorized to take the acknowledgment or proof of deeds to entitle them to be recorded within the state. Such deposition must be certified by the officer before whom it is made, and may be filed in the office of the secretary of state, and when so filed, must be recorded by him in a book kept for that purpose. Such deposition shall be presumptive evidence of the facts therein contained."

See for recording deposition of resident alien and for certified copy thereof: see EXECUTIVE LAW, § 26, subd. 11.

Constitutionality.—The state in conferring new privileges upon aliens has "a perfect and equitable right to demand as the price thereof that they should assume certain duties and responsibilities for its benefit." *McCormack v. Coddington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 731, 96 N. Y. S. 571; *Marx v. McGlynn*, (1882) 88 N. Y. 357, affirming 25 Hun 419.

Naturalization defined. Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen. *Boyd v. Nebraska*, (1891) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103.

Right to acquire citizenship.—The right of aliens to acquire citizenship is purely statutory. It is not an inherent right, but is a mere privilege. *Zartarian v. Billings*, (1906) 204 U. S. 170, 27 S. Ct. 182, 51 U. S. (L. ed.) 423; *In re Buntaro Kumagai*, (1908) 163 Fed. 922.

Presumption as to alien's status.—The original status of an alien is presumed to continue until the contrary is shown. *Hauenstein v. Lynham*, (1879) 100 U. S. 183, 25 U. S. (L. ed.) 628; *Green v. Salas*, (1887) 31 Fed. 106.

Effect of declaration. A declaration of intention to become a citizen does not renounce an alien's allegiance to a foreign country, but merely declares that it is his intention so to do at some later day; and so long as his foreign allegiance continues he remains an alien. *In re Moses*, (1897) 83 Fed. 995; *Minneapolis v. Reum*, (1893) 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31; *Maloy v. Duden*, (1885) 25 Fed. 673; *Lang v. Randall*, (1876) 4 Dill 125, 11 Fed. Cas. No. 8,080. But it seems that the requirement as to the making and filing of the deposition did not abolish the common law right of an alien to take by purchase. *Matter of Lee*, (1844) 4 Edw. Ch. 395. It has been held that parties under a contract to purchase real estate cannot set up, as a defense to an action for specific performance, the fact of their alienism. *Scott v. Thorpe*, (1832) 1 Edw. Ch. 512.

Distinction between resident and nonresident aliens.—This section made no distinction between resident and nonresident aliens and a nonresident alien might take a devise of real property situate in the state of New York and hold it even as against the state, provided he filed a declaration of his intention to become a citizen. *Smith v. Reilly*, (1900) 31 Misc. 701, 66 N. Y. S. 40, affirmed 70 App. Div. 286, 74 N. Y. S. 967; *McCarty v. Terry*, (1872) 7 Laus. 236. The section clearly permitted the deposition mentioned to be made by an alien residing in any part of the United States who had declared

his intention of becoming a citizen, and who was and intended to remain a resident of the United States. *Op. Atty.-Gen.* (1907) 280. But under the Act of 1845 (L. 1845, ch. 115, as amended by L. 1874, ch. 261, and L. 1875, ch. 38) entitled "An act to enable resident aliens to hold and convey real estate and for other purposes," it was held that the use of the word "resident" in the title seemed to exclude any intention of conferring any rights upon nonresident aliens. *In re Powers*, (1884) 6 Civ. Pro. 326.

Nature of alien's title prior to filing deposition.—Under the provision of L. 1845, ch. 115, § 1, to enable resident aliens to hold and convey real estate, which provided that a resident alien to whom any real estate had been or should thereafter be devised, might on filing the deposition of intention to become a citizen, prescribed by 1 R. S. 720, § 15, hold the real estate the same as if he were a citizen at the time of the devise, a resident alien devisee of a citizen was held to take, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the state until he complied with the conditions as to aliens. *Hall v. Hall*, (1880) 81 N. Y. 130, affirming 13 Hun 306. And under section 5 of the same act it was held that a resident alien who had taken title to real estate could convey or devise the same, and such conveyance or devise was effectual, although no deposition had been filed. *Goodrich v. Russell*, (1870) 42 N. Y. 177; *Dusenberry v. Dawson*, (1877) 9 Hun 511.

Failure of alien heir to file declaration.—Under section 4 of chapter 115 of the Laws of 1845 (amd. L. 1874, ch. 261; L. 1875, ch. 38) an alien inheriting real estate from a citizen could hold it as against the state only by making and filing a deposition or affirmation of his intention to become a citizen, as required by the first section of the act. A failure to file such declaration rendered his title liable to forfeiture during life by the state in proceedings to be taken for that purpose. Upon his death without having filed such declaration, the fact that the state failed in his lifetime to take such proceedings did not constitute a waiver or loss of its rights and permit him to transmit his title by inheritance to a citizen heir; but his death ipso facto worked an immediate escheat to the state, no proceedings on its part being necessary to effect it, and, therefore, in the absence of any legislation authorizing it, the title of such heir could not be successfully maintained as against the state, in a subsequent partition action in which it asserted its rights. *McCormack v. Coddington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 741, 96 N. Y. S. 571. The provision that an alien should not be capable of taking or holding land conveyed or devised to him, previous to his making the required deposition, prevented his title thus acquired from being good as against the people, but did not impair the common-law rule, as the statute enabled a resident alien who had filed the deposition to take and hold lands by descent, of which he was incapable at common law, and by devise, and also rendered the land descendible to his heirs inhabiting the United States in case of his death within six years. *Wright v. Saddler*, (1859) 20 N. Y. 320. And as against every claimant except the state the title of an alien heir was good, and he might hold the real estate without making the deposition required. *Stamm v. Bostwick*, (1890) 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597, affirming 40 Hun 35; *Smith v. Reilly*, (1900) 31 Misc. 701, 66 N. Y. S. 40, affirmed 70 App. Div. 286, 74 N. Y. S. 967; *Maynard v. Maynard*, (1885) 36 Hun 227. Thus the title was defeasible by the state unless before the consummation of the proceedings instituted to declare the forfeiture the heirs became citizens or filed the necessary deposition; if they did either their right and title became absolute and indefeasible. *Goodrich v. Russell*, (1870) 42 N. Y. 177; *Maynard v. Maynard*, (1885) 36 Hun 227. But it has been held that where a nonresident alien died intestate three months after a testator, before the will of the latter had been proved, and without having declared his intention to become a citizen, his only daughter and heir, although herself a nonresident alien, took a fee, as no condition subsequent looking to naturalization was imposed upon a female alien in such case. *Smith v. Reilly*, (1900) 31 Misc. 701, 66 N. Y. S. 40, affirmed 70 App. Div. 286, 74 N. Y. S. 967.

Cited.—This section was cited in *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119; *Op. Atty.-Gen.* (1908) 526.

§ 13. When and how alien may acquire and transfer real property. [Repealed.]

This section was repealed by L. 1913, ch. 152, § 2. Section 1 of the same Act amended section 10, supra, and L. 1913, ch. 153, repealed section 13 of the Decedent Estate Law.

This section, as it stood at the time of its repeal, was as follows: "An alien may, for a term of six years after filing the deposition described in the last preceding section, take, hold, convey and devise real property. If such deposition be filed, or such alien be admitted to citizenship, a grant, devise, contract or mortgage theretofore made to or by him is as valid and effectual as if made thereafter; provided, however, that a devise to an alien shall not be valid unless a deposition be filed by him, or he be admitted to citizenship, within one year after the death of the testator, or if the devisee is a minor, within one year after his majority. If a person who has filed such a deposition dies within six years thereafter, and before he is admitted to citizenship, his widow is entitled to dower in his real property, and if he dies intestate, his heirs or the persons who would otherwise answer to the description of heirs, inherit his real property, upon such persons being admitted to citizenship, or filing a deposition in their own behalf, within one year after such death, or if minors, within one year after their majority. If an action or proceeding is commenced by the state to recover real property held by an alien, such action or proceeding shall be suspended upon the filing of such deposition, and the service of a certified copy thereof upon the attorney-general, and the payment of the costs to the time of such service."

Adverse possession by aliens: see 12 Ann. Cas. 981 note.

Rule at common law.—By the common law, an alien could neither receive nor transmit lands by descent; nor could he interrupt the descent of the inheritance to others, and real estate was transmitted by descent to the next heir, in the same manner as if such alien had never been in existence, except that if the alien had children born within the king's allegiance, or such children were naturalized, they might inherit from each other. *Jackson v. Fitz Simmons*, (1832) 10 Wend. 9, 24 Am. Dec. 198; *Banks v. Walker*, (1848) 3 Barb. 438. Nor could an alien take real estate by devise. *Marx v. McGlynn*, (1882) 88 N. Y. 357, affirming 25 Hun 449; *Beekman v. Bonsor*, (1861) 23 N. Y. 298, 80 Am. Dec. 269, affirming 27 Barb. 260. A bequest of money to be laid out in lands for the benefit of aliens, who were to have the possession and enjoyment thereof, was held invalid. *Beekman v. Bonsor*, (1861) 23 N. Y. 298, 80 Am. Dec. 269, affirming 27 Barb. 260.

Legislative power over descents.—There is no doubt that the legislature has power to alter or abolish the law of descents. *Kennedy v. Wood*, (1838) 20 Wend. 230.

Sources of citizenship.—There are only two sources of citizenship, birth and naturalization. *Elk v. Wilkins*, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643. And admission to citizenship is wholly a subject of statutory law or treaty stipulation. Aside from affirmative legislation or treaty provision by the state or nation whose protection and privileges are sought by a foreigner, there is no inherent right in him to enjoy such protection or privileges and no obligation on its part to permit him to do so. *United States v. Martorana*, (1909) 171 Fed. 397, 96 C. C. A. 353.

Presumption as to citizenship.—Original citizenship is presumed to continue where there is no proof that a person has denaturalized himself or ceased to be a citizen and subject of a foreign power. *Hauenstein v. Lynham*, (1879) 100 U. S. 483, 25 U. S. (L. ed.) 628.

Proof of naturalization.—The usual proof of naturalization is a copy of the record of the court, but it is equally true that where no record of naturalization can be produced evidence that a person having the requisite qualifications to become a citizen did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen. *Contzen v. United States*, (1900) 179 U. S. 191, 21 S. Ct. 98, 38 U. S. (L. ed.) 148; *Boyd v. Nebraska*, (1891) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103.

Conclusiveness of naturalization.—The administration of the oaths and the issuance of the certificate, showing the satisfaction of the court as to the requirements, constitute a judgment of admission to citizenship, with the force

of such a judgment upon the status of the applicant. *Pintsch Compressing Co. v. Bergin*, (1897) 84 Fed. 140; *United States v. Gleason*, (1897) 78 Fed. 396, affirmed 90 Fed. 778, 62 U. S. App. 311, 33 C. C. A. 272.

Retroactive effect of naturalization.—Naturalization by virtue of the laws of the United States has no retroactive operation to vest or confirm in the subject the title to lands which, by reason of his alienage, he could not inherit at the time of the death of the ancestor, and it was therefore held that the act of April 10, 1843, § 1, authorizing a naturalized citizen, to whom lands would have descended if he had been a citizen at the time of the death of the person last seized, to continue to hold the same in like manner as if he had been a citizen at the time of such descent east, applied only to those who were then naturalized citizens. *Henry v. Brooklyn Benev. Soc.*, (1868) 39 N. Y. 333.

Effect of expiration of six years.—After the expiration of the six years mentioned in this statute prior to its repeal the alien lost all the privileges secured, except the right to hold the estate, unless he became naturalized according to the provisions of the laws of the United States. *Renner v. Müller*, (1879) 57 How. Pr. 229.

Dower in wives of aliens at common law.—At common law an alien widow of a native born or naturalized citizen was not entitled to dower in the lands of her husband. *Burton v. Burton*, (1864) 1 Keyes 359, 1 Abb. Ct. App. 271; *Currin v. Finn*, (1846) 3 Denio 229; *Sutliff v. Forgey*, (1823) 1 Cow. 89. And she was not entitled to dower, although at the time of her marriage her husband was also an alien and held land under the act of 1825 enabling aliens to purchase and hold real estate. While her husband had the capacity to purchase and hold real estate, she, not having such capacity, could not claim dower in the lands of her husband. *Connolly v. Smith*, (1839) 21 Wend. 59; *Priest v. Cummings*, (1838) 20 Wend. 338. The rule was the same, although after the death of the husband she filed, within the time limited, the deposition required to be filed by aliens. *Mick v. Mick*, (1833) 10 Wend. 379. But was held under the Act of 1802 (2 R. L. 542) that the widow of an alien purchaser took her dower as a purchaser within the meaning of that act. *Forgey v. Sutliff*, (1825) 5 Cow. 713.

Conversion into personalty.—Land, over which an alien has no other control except to compel its lease or conversion into personal estate, so far as regards forfeiture for such alienage, is looked upon as already converted into personalty, whether such right arises from conveyance, or devise. *Ludlow v. Van Ness*, (1861) 8 Bosw. 178; *Austice v. Brown*, (1837) 6 Paige 448.

Adverse possession by alien.—Although an alien could not acquire title to real estate, as against the true owner, by an adverse possession of twenty years, it was held that the statute of limitations furnished a perfect defense to an action of ejectment brought against him by the true owner. *Overing v. Russell*, (1860) 32 Barb. 263. And a special act (L. 1875, ch. 121), which enabled an alien widow of a naturalized citizen to take and hold real estate, and which released to her the title of lands escheated to the state, was held to be a sufficient foundation upon which to base a claim of title by adverse possession. *Criswell v. Noble*, (1908) 61 Misc. 483, 113 N. Y. S. 954. And see generally 21 Ann. Cas. 981 note.

Conveyance to alien in trust.—Where an alien, for the purpose of evading the law, purchases land and takes a conveyance thereof in the name of a third person without any written declaration of trust, a resulting trust will not arise in favor of the purchaser; as equity will never raise a resulting trust in fraud of the rights of the state or of the laws of the land. *Leggett v. Dubois*, (1835) 5 Paige 114.

Infant child of deceased alien.—Where the alien father of an infant declared his intention to become a citizen but had not been naturalized before his death, it was held that the infant was entitled to use the father's declaration with the same effect as if he himself had made it, and to become a full citizen, after his arrival at majority, by presenting the ordinary final petition and taking the oaths prescribed by law. [Section 2168 1 U. S. Comp. St. 1901, p. 1332.] In re *Shearer*, (1908) 158 Fed. 839. Minors acquired an inchoate status by the declaration of intention on the part of their parents to become citizens. *Boyd v. Nebraska*, (1891) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103.

Effect of early statute as to descent.—Under the provision of the act of 1845, to enable resident aliens to hold and convey real estate (L. 1845, ch. 115,

§ 1), which provided that a resident alien to whom any real estate had been or should thereafter be devised, might on filing the deposition of intention to become a citizen, prescribed by the Revised Statutes (1 R. S. 720, § 15), hold the real estate the same as if he was a citizen at the time of the devise, a resident alien devisee of a citizen was held to take, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the state until he complied with the conditions as to aliens. *Hall v. Hall*, (1880) 81 N. Y. 130, affirming 13 Hun 306. It was held that the language of section 4 of chapter 115 of the Laws of 1845, as amended by chapter 38 of the Laws of 1875, referring to "the lands and real estate owned and held by such deceased alien or citizen at the time of his decease," did not embrace all lands, however acquired, and that nonresident aliens took no interest in the land acquired by an intestate by descent. *Branagh v. Smith*, (1891) 46 Fed. 515; *Callahan v. O'Brien*, (1893) 72 Hun 216, 25 N. Y. S. 410, 55 N. Y. St. Rep. 201.

Cited.—This section was cited in *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. 1119; *Op. Atty-Gen.* (1908) 526.

§ 14. Effect of woman's marriage with alien. [Repealed.]

This section was repealed by L. 1913, ch. 152, § 2. Section 1 of the same chapter amended section 10, *supra*, and L. 1913, ch. 153, repealed section 13 of the Decedent Estate Law.

This section, as it stood at the time of its repeal, was as follows: "Any woman born a citizen of the United States, who shall have married or shall marry an alien, and the foreign-born children and descendants of any such woman, shall, notwithstanding her or their residence or birth in a foreign country, be entitled to take, hold, convey and devise real property situated within this state in like manner, and with like effect, as if such woman and such foreign-born children and descendants were citizens of the United States; and the title to any such real property shall not be impaired or affected by reason of such marriage, or residence, or foreign birth; provided, that the title to such real property shall have been or shall be derived from or through a citizen of the United States."

Property and powers of married women: see DOMESTIC RELATIONS LAW, §§ 50, 51.

Sources of citizenship.—There are only two sources of citizenship, birth and naturalization. *Elk v. Wilkins*, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643.

Naturalization of married woman.—A feme covert, who is an alien, may be naturalized without the concurrence of her husband. *Priest v. Cummings*, (1837) 16 Wend. 617. But an alien woman dwelling in this country and married to an alien, cannot acquire citizenship by naturalization, although otherwise qualified. *In re Rionda*, (1908) 164 Fed. 368.

Marriage of alien female with citizen.—The intermarriage of an alien female with a citizen operates to make her a citizen and therefore capable of taking and holding lands by purchase or descent (U. S. R. S., § 1994, 2 Fed. Stat. Ann., 2d ed., 117). *Wainwright v. Low*, (1892) 132 N. Y. 313, 30 N. E. 747, affirming 57 Hun 386, 10 N. Y. S. 888; *Luhrs v. Eimer*, (1880) 80 N. Y. 171, affirming 15 Hun 399; *Burton v. Burton*, (1864) 1 Keyes 359; *Kelly v. Owen*, (1868) 7 Wall. 496, 19 U. S. (L. ed.) 283; *Halsey v. Beer*, (1889) 52 Hun 366, 5 N. Y. S. 334; *People v. Newell*, (1885) 38 Hun 78; *Leonard v. Grant*, (1880) 5 Fed. 11. So, it has been held that an alien female who lawfully enters this country for a lawful purpose and marries an American citizen becomes herself an American citizen. *Sprung v. Morton*, (1909) 182 Fed. 330. See also *Hopkins v. Eichant*, (C. C. A. 1904) 130 Fed. 839, 65 C. C. A. 1. Where a Chinese woman marries an American citizen she becomes a citizen. *Tsoi Sim v. United States*, (1902) 116 Fed. 920, 54 C. C. A. 154.

Marriage of citizen female with alien.—A woman who is a citizen of the United States does not lose that citizenship by marriage to an alien, so long as she continues to reside in the United States. *Wallenburg v. Missouri Pac. R. Co.*, (1908) 159 Fed. 217. The political status of the wife follows that of her husband, but there must be a withdrawal from her native country

or some equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage. *Ruckgaber v. Moore*, (1900) 104 Fed. 947.

For a historical review as to the effect of marriage with an alien, see *Ludlam v. Ludlam*, (1863) 26 N. Y. 356, 84 Am. Dec. 193, affirming 31 Barb. 486.

Deed to citizen wife and alien husband.—In an early case it was held that a deed to a citizen wife and an alien husband operated to vest the whole estate in the wife, as they were not tenants in common or joint tenants, but were in effect one grantee, so that the wife took the whole, the husband being incapable of holding with her. *Wright v. Saddler*, (1859) 20 N. Y. 320.

Wife's domicile as that of her husband.—It is a well-established rule of law that, whether a husband and wife are living together or apart, the wife's domicile in the eye of the law is that of her husband, and that she is not capable of establishing a separate domicile. *Nichols v. Nichols*, (1889) 92 Fed. 1. And the marriage of a daughter, even under age, is an immediate emancipation from the control of her father, and by such marriage she has the power of changing her domicile to that of her husband, though she cannot otherwise change it by her own election during her minority. *Peck v. Young*, (1841) 26 Wend. 613, writ of error dismissed 1 How. 250, 11 U. S. (L. ed.) 120.

Devise of remainder to aliens.—In *McGillis v. McGillis*, (1898) 154 N. Y. 532, 49 N. E. 145, modifying 11 App. Div. 359, 42 N. Y. S. 921, the testator was a citizen of the United States, and his daughter was born here, but her husband was an alien, and after her marriage she resided in a foreign country, where her children were born. The daughter, having survived her husband, died in 1893, leaving as her surviving issue six children, three born before the death of the testator and three after, and one infant grandchild, the son of a deceased child born after the death of the testator. At the time of the death of the testator's daughter the provisions of the Revised Statutes (2 R. S. 57, § 4) making void a devise to a person who, at the time of the death of the testator, was an alien, had been changed by chapter 42 of the Laws of 1889, so that such provisions no longer applied to the foreign-born children of a married woman born in this country. It was held that as there was no outstanding vested remainder in the way of the operation of the Act of 1889, it applied to the devise in question; that under that statute, existing at the time of the death of the daughter, the devised estate, if it had been hers and she had died intestate, would have descended to her children, the infant grandchild taking his parent's portion, which would have been one-seventh of the estate; and, hence, that the infant was seized of an undivided one-seventh interest in the devised premises.

Resumption of alienage.—An alien woman who has once become an American citizen by operation of law, may resume her alienage by marriage to an alien husband. *Pequignot v. Detroit*, (1883) 16 Fed. 211.

Cited.—This section was cited in *Haley v. Sheridan*, (1907) 190 N. Y. 331, 83 N. E. 296, affirming 114 App. Div. 903, 100 N. Y. S. 1119; *Vau Cortlandt v. Nivert*, (1890) 57 Hun 590 mem., 59 Hun 161, 11 N. Y. S. 148.

§ 15. Title through alien. The right, title or interest in or to real property in this state now held or hereafter acquired by any person entitled to hold the same can not be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise.

This section was derived from Real Property Law of 1896, § 7.

Capacity to hold and transfer real property: see supra, §§ 16, 11.

Inheritance from aliens: see DECEDENT ESTATE LAW, § 95.

Rule at common law.—At common law an alien acquiring land by purchase or devise obtained a good title thereto as against everyone but the state, and defeasible by the latter only by legal proceedings instituted for the

purpose of vesting title to such land in the state on the ground of the alienism of such purchaser. *Goodrich v. Russell*, (1870) 42 N. Y. 177; *Wadsworth v. Wadsworth*, (1855) 12 N. Y. 376, affirming 16 Barb. 601; *Jackson v. Adams*, (1831) 7 Wend. 367. And under the common-law rule of descents the alienism in a common grandfather did not impede the descent of land between cousins, whose immediate ancestors were brothers, and capable of transmitting by descent. *McGregor v. Comstock*, (1850) 3 N. Y. 408. But it was held that a cousin of an intestate could not inherit the decedent's real property where the mothers of the heir and of the decedent were both aliens. *Jackson v. Green*, (1831) 7 Wend. 333. To the same effect, see *Jackson v. Fitz Simmons*, (1832) 10 Wend. 9, 24 Am. Dec. 198; *Redpath v. Rich*, (1849) 5 Super. Ct. 79.

Statutory rule as to inheritance.—The provisions of section 95 of the Decedent Estate Law that "a person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor," apply only where the person answering to the description of an heir is capable of tracing his relationship to the intestate independently of and not through a living alien who, but for his alienage, would himself take the property. Accordingly, where an intestate leaves surviving him a sister and her daughter, the former of whom is an alien, the intestate's niece is not entitled to take the intestate's real property under this section, as she must trace her relationship to the intestate through her mother, a living alien. *McLean v. Swanton*, (1856) 13 N. Y. 535. To the same effect see *People v. Irwin*, (1839) 21 Wend. 128; *Heeney v. Brooklyn Benev. Soc.*, (1861) 33 Barb. 360, affirmed (1868) 39 N. Y. 333; *Renner v. Müller*, (1879) 57 How. Pr. 229; *Larreau v. Davignon*, (1866) 5 Abb. Pr. N. S. 367. The word "ancestor," as used in section 95 of the Decedent Estate Law, includes both lineal and collateral ancestors through whom the heir must trace his relationship to the intestate. *Wheeler v. Clutterbuck*, (1873) 52 N. Y. 67; *McCarthy v. Marsh*, (1851) 5 N. Y. 263, overruling *Banks v. Walker*, (1848) 3 Barb. Ch. 438; *Douglass v. Douglass*, (1911) 70 Misc. 412, 128 N. Y. S. 912; *Callahan v. O'Brien*, (1893) 72 Hun 216, 25 N. Y. S. 410, 55 N. Y. St. Rep. 201. So, where an intestate leaves surviving him a niece, who though residing abroad was a citizen of this state at the time of his death, and a brother, who was naturalized some years after the intestate's death, the niece is entitled to take the whole of his real property, as being his only heir entitled to inherit at the time of his death. *Lynch v. Clarke*, (1844) 1 Sandf. Ch. 583. Formerly an alien inheriting real property from a citizen of this state could hold it against the state only by filing a deposition of his intention to become a citizen. Hence where a nonresident alien inherited realty from a citizen and died without having made the required deposition, the state might institute proceedings for the forfeiture of the property, and a sister of the alien could not inherit under section 95 of the Decedent Estate Law, as it only cured trouble arising from the alienism of an intermediate link in the chain of pedigree where the ancestor was otherwise capable of transmitting title. *McCormack v. Coddington*, (1906) 184 N. Y. 467, 77 N. E. 979, reversing 109 App. Div. 741, 96 N. Y. S. 571, which affirmed 46 Misc. 510, 95 N. Y. S. 46. See also *McLean v. Swanton*, (1856) 13 N. Y. 535. Alien descendants of a deceased sister of an intestate, who was also an alien, are not within the provisions of this section, as it applies only to the case where the descent must be traced through an ancestor who was alien, and not where some of the persons who answer to the description of heirs are themselves aliens. *Luhrs v. Eimer*, (1880) 80 N. Y. 171. See also *Hall v. Hall*, (1880) 81 N. Y. 130.

Cited.—This section was cited in *Haley v. Sheridan*, (1905) 107 App. Div. 17, 94 N. Y. S. 864.

§ 16. Liabilities of alien holders of real property. Every alien holding real property in this state is subject to duties, assessments, taxes and burdens as if he were a citizen of the state.

This section was derived from Real Property Law of 1896, § 8.
Qualifications for holding office: see PUBLIC OFFICERS LAW, § 3.

Qualifications of trial jurors: see JUDICIARY LAW, §§ 502, 598, 686. *Grand jurors:* see Code Crim. Pro. § 229b.

Citizen defined.—"A citizen is one who owes the government allegiance, service and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and conscience, the right of acquiring and possessing property, of marriage and the social relations of suit and defense, and security in person, estate and reputation." *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848.

Taxes.—"There can be no question that taxes may be assessed against every alien holding real estate in the state of New York." *People v. Dunckel*, (1910) 69 Misc. 361, 125 N. Y. S. 385.

Aliens as jurors.—The verdict of a jury will not be set aside because one of the jurors was an alien, where the objection was not made when the jury was drawn. *Bennett v. Matthews*, (1870) 40 How. Pr. 428.

§ 17. Heirs of patriotic Indian. The heirs of an Indian to whom real property was granted for military services rendered during the war of the Revolution may take and hold such real property by descent as if they were citizens of the state at the time of the death of their ancestors. A conveyance of such real property to a citizen of this state, executed by such Indian or his heirs after March seventh, eighteen hundred and nine, is valid, if executed with the approval of the surveyor-general or state engineer and surveyor indorsed thereupon.

This section was derived from Real Property Law of 1896, § 9.

Status and property rights of Indians generally: see INDIAN LAW.

Jurisdiction of Surrogate's Court: see INDIAN LAW, § 5 note.

Source of section.—The acts of 1809 (Private Laws of 1809, p. 62) and of 1810 (Act of March 2, 1810) declared that the deed of certain Indian heirs shall be valid, if executed with the approbation of the surveyor-general. The objects of those acts was to give Indians, in certain cases, the same capacity to take, hold and convey lands, as though they were citizens of this state. The provisions were subsequently embodied in the Revised Statutes (1 R. S. 720, § 13) and the Real Property Law of 1896 (L. 1896, ch. 547, § 9). See *Gillett v. Stanley*, (1841) 1 Hill 121. Prior to the acts passed in 1809 and 1810 an Indian owning lands within this state, though by title derived from the government, had no legal capacity to convey, and a conveyance by him, unless ratified in the form prescribed by law, was inoperative and void. *Murray v. Wooden*, (1837) 17 Wend. 531.

Power to hold and convey generally.—Under the Indian Law a native Indian may take, hold and convey real property the same as a citizen. See INDIAN LAW, § 2.

Status of Indians as citizens of United States.—Indians were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. *Elk v. Wilkins*, (1884) 112 U. S. 94, 5 S. Ct. 41, 28 U. S. (L. ed.) 643; *Seneca Nation of Indians v. Appleby*, (1909) 196 N. Y. 318, 89 N. E. 835, reversing 127 App. Div. 770, 112 N. Y. S. 177. And it has been held that Indians are wards of the federal government and subject to its control and management. *United States v. Kagama*, (1886) 118 U. S. 375, 6 S. Ct. 1109, 30 U. S. (L. ed.) 228; *The Cherokee Tobacco*, (1870) 11 Wall. 616, 20 U. S. (L. ed.) 227; *Shongo v. Miller*, (1899) 45 App. Div. 339, 61 N. Y. S. 281, affirmed without opinion (1901) 169 N. Y. 586, 62 N. E. 1100; *Jemison v. Bell Telephone Co.*, (1906) 186 N. Y. 493, 79 N. E. 728, affirming 109 App. Div. 911, 95 N. Y. S. 1137; *Seneca Nation of Indians v. Christie*, (1891) 126 N. Y. 122, 27 N. E. 275, affirming 49 Hun 524, 2 N. Y. S. 546, writ dismissed 162 U. S. 283, 16 S. Ct. 828, 40 U. S.

(L. ed.) 970. When an Indian becomes a citizen of the United States, he also becomes a citizen of the state wherein he resides. *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848.

Form of approbation.—It has been held that the indorsement of the surveyor-general's approbation need not state his reasons therefor, and that the statement, "I approve of the within deed," is sufficient. *Jackson v. Brown*, (1818) 15 Johns. 264.

Approval of void deed.—The approbation of the surveyor-general to the deed of an Indian patentee, or his heirs, that was void and inoperative, has been held not to preclude him from afterwards giving his assent to a valid and operative deed from the same grantor for the same land. *Jackson v. Brown*, (1818) 15 Johns. 264.

When deed takes effect.—A conveyance specified in the section takes effect only when the approbation of the proper officer is endorsed thereon. *Jackson v. Hill*, (1830) 5 Wend. 532.

Legislative consent to Indian land transactions.—"No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority, and with the consent of the legislature." See Constitution, art. 1, § 15.

Right to maintain action of ejectment.—While Indians have the undoubted right to the beneficial use and occupancy of their lands, no provision had been made by law for bringing ejectment to recover possession of them, and as a body or tribe the Indians have no corporate name by which they can institute such a suit. Their only remedy is by an enabling act of the legislature. *Johnson v. Long Island R. Co.*, (1900) 162 N. Y. 462, 56 N. E. 992, reversing 42 App. Div. 626, 61 N. Y. S. 1139; *Seneca Nation of Indians v. Christie*, (1891) 126 N. Y. 122, 27 N. E. 275, affirming 49 Hun 524, 2 N. Y. S. 546, writ dismissed 162 U. S. 283, 16 S. Ct. 828, 40 U. S. (L. ed.) 970; *Strong v. Waterman*, (1845) 11 Paige 607. See INDIAN LAW, § 5 note.

Rule of construction.—It is a well-settled rule "that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, (1906) 203 U. S. 76, 27 S. Ct. 29, 51 U. S. (L. ed.) 96.

§ 18. **Mines in Saint Lawrence county.** The proprietors of any mines or veins of lead or copper in the county of Saint Lawrence, may demise, lease, or rent the same for a period not to exceed twenty-one years from the date of any such lease, to any foreign individual or company, and such lessee may take, hold, work, use or convey the same during the said term, in the same manner and subject to the same liabilities as if such lessee were a natural born citizen.

This section was derived from L. 1855, ch. 17, § 1.

Mines generally: see PUBLIC LANDS LAW, § 80 et seq.

Inspection and regulation of mines generally: see LABOR LAW, § 119 et seq.

Refusal to admit inspector to mines, tunnels and quarries: see PENAL LAW, § 1270.

Payment of employees of mining companies in cash: see LABOR LAW, § 10.

ARTICLE 3

CREATION AND DIVISION OF ESTATES

- Section 30. Enumeration of estates.
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§ 30. Enumeration of estates. Estates in real property are divided into estates of inheritance, estates for life, estates for years, estates at will, and by sufferance.

This section was derived from Real Property Law of 1896, § 20.

Section 30 of the Real Property Law of 1896 is now covered by section 40.

Estates of inheritance and for life as estates of freehold: see *infra*, § 33.

Estates for years as chattels real: see *infra*, § 33.

Estates at will or by sufferance as chattel interests: see *infra*, § 33.

Estates in severalty, joint tenancy and in common: see *infra*, § 65.

When estate for life or years is changed into a fee: see *infra*, § 149.

Power of life tenant to make leases: see *infra*, § 155.

Effect of mortgage by life tenant having power to make leases: see *infra*, § 156.

Termination of tenancies at will or by sufferance by notice: see *infra*, § 228.

Conveyance by tenant for life or years of greater estate than possessed: see *infra*, § 247.

When remainderman may pay interest owed by life tenant: see *infra*, § 269.

Presumption of death of person upon whose life an estate in real property depends: see Code Civ. Pro., § 841.

Estates for life and leases for years as assets of decedent: see Code Civ. Pro., § 2672.

Sovereignty of state.—The state, by virtue of its sovereignty, is deemed to possess the original and ultimate property in and to all lands within its jurisdiction (Const., art. 1, § 10). *Smith v. Rochester*, (1883) 92 N. Y. 463, 44 Am. Rep. 393; *People v. Trinity Church*, (1860) 22 N. Y. 44; *People v. Van Rensselaer*, (1853) 9 N. Y. 291, reversing 8 Barb. 189; *De Peyster v. Michael*, (1852) 6 N. Y. 467, 57 Am. Dec. 470; *People v. Fulton Fire Ins. Co.*, (1840) 25 Wend. 205; *People v. Denison*, (1837) 17 Wend. 312; *People v. Conklin*, (1841) 2 Hill 67; *Renner v. Müller*, (1879) 57 How. Pr. 229.

Legislative power to determine character and nature of estates.—The tenure of property, whether real or personal, and the character and nature of the estates that may be created therein, have always been the subject of legislative action. The legislature might forbid the creation of any trust estates in property, or the suspension of the power of alienation for any period whatever, as it has forbidden the suspension of the power of alienation beyond two lives in being. *Powers v. Bergen*, (1852) 6 N. Y. 358; *Snedeker v. Congdon*, (1899) 41 App. Div. 433, 58 N. Y. S. 885.

Modification of common law rules.—The statutes of the state have, to some extent, modified the rigor and relaxed some of the technical rules of the common law in respect to estates. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272. And it was one of the objects of the Revised Statutes to reduce to greater simplicity the rules governing the taking, holding and transmitting of real estate, and especially to favor the vesting of estates and the alienability thereof. *Moore v. Littel*, (1869) 41 N. Y. 66.

Hereditaments as estates of inheritance.—Hereditaments are included in the terms "estates of inheritance," and such estates may be held in fee, and are capable of having the same interest and estate created in them, as may or can pertain to any real estate. They are created, granted, assigned, extinguished and inherited in the same manner and by the same forms as other real property, and are distinguished therefrom mainly by the fact that they

* So in original.

are incorporeal, instead of corporeal property. *Nellis v. Munson*, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575.

Easements.—The principal requisite of an easement is that it be imposed upon corporeal real property, for the benefit of corporeal real property, and that there be two distinct estates, the dominant and the servient. It can be inherited and is therefore classified by elementary writers as a hereditament. Its owner has neither the general property in nor seizin of the servient estate, but by holding a fee in the estate to which such easement is appurtenant, he has an estate of inheritance in the easement. *Nellis v. Munson*, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575. And an easement has been defined to be “a permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership.” *Southampton Freeholders, etc., v. Jessup*, (1900) 162 N. Y. 122, 56 N. E. 538, reversing 10 App. Div. 456, 42 N. Y. S. 4. See also *Long Island R. Co. v. Garvey*, (1899) 159 N. Y. 334, 54 N. E. 60, affirming 11 App. Div. 626, 42 N. Y. S. 155.

Character of life estate on termination.—On the death of the owner, an estate *per autre vie* becomes a chattel real, and goes as assets to the executor or administrator to be applied and distributed as part of the personal estate of the testator or intestate. *Reynolds v. Coffin*, (1842) 3 Hill 441; *Gillis v. Brown*, (1826) 5 Cow. 388; *Crooked Lake Nav. Co. v. Kenka Nav. Co.*, (1885) 37 Hun 9.

Leasehold for term of years.—A leasehold for a term of years was at common law personal property, but the statutes have for some purposes modified its character, and estates for years are denominated estates in land. A judgment binds and is a charge upon them, yet they go to the personal representatives as assets for distribution, and vest in executors as part of the testator's personal estate. *Wells v. Higgins*, (1892) 132 N. Y. 459, 30 N. E. 861; *People v. McAdam*, (1881) 84 N. Y. 287, reversing 22 Hun 559; *Despard v. Churchill*, (1873) 53 N. Y. 192; *Pugsley v. Aikin*, (1854) 11 N. Y. 494; *Averill v. Taylor*, (1853) 8 N. Y. 44; *Bennett v. Crain*, (1886) 41 Hun 183, 4 N. Y. St. Rep. 158. And a tenancy from year to year may grow out of an occupancy under a void parol lease for more than a year. Thus, a party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes, by reason of the invalidity of the demise under the statute of frauds, a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close, and he can terminate his tenancy only at the end of the current year. *Coudert v. Cohn*, (1890) 118 N. Y. 309, 23 N. E. 298, 16 A. S. R. 761, 7 L. R. A. 69. See also *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 L. R. A. 607, 8 L. R. A. 221; *Laughran v. Smith*, (1878) 75 N. Y. 205, affirming 11 Hun 311; *Reeder v. Sayre*, (1877) 70 N. Y. 180, 26 Am. Rep. 567, affirming 6 Hun 562. But where parties entered into a verbal contract by which plaintiff agreed to occupy a portion of defendant's farm for a period of five years, each to do certain work and furnish certain things specified, the receipts of sales of the products of the land to be equally divided, and plaintiff took possession of the premises and occupied them for over two years, when he was dispossessed, it was held, in an action to recover damages for breach of the agreement, that it was void, as it was not to be performed within a year, and that the occupancy under it did not create a tenancy from year to year. *Yuglish v. Marvin*, (1891) 128 N. Y. 380, 28 N. E. 634. See *infra*, § 242, as to necessity of writing.

Lessee for years.—A lessee for years has an estate in land, but to constitute such an estate in the lessee, the lessor must, at the time of giving the lease, have an estate out of which the term may be carved, or he must subsequently acquire title which by the operation of the covenants of the lease will inure to the benefit of the lessee, and thus give him an estate in the land. If the lessor has no title at the time of giving the lease, and does not thereafter acquire any, the lessee has no estate or interest in the land by virtue of the lease, any more than a grantee in fee where his grantor has no title. The lessee acquires an estate in the land under the lease only where the lessor has title enabling him to create the estate, or when acting under a power adequate for such purpose. *Burr v. Stenton*, (1871) 43 N. Y. 462, affirming

52 Barb. 377; Crooked Lake Nav. Co. v. Keuka Nav. Co., (1885) 37 Hun 9; Elmira v. Dunn, (1856) 22 Barb. 402. And a lease of lands for a term of years with privilege of renewal given by a life tenant terminates at her death and the remaindermen become entitled to possession, but where after the death of the life tenant and in spite of dispossession proceedings brought by the remaindermen, there being no warrant issued for the removal of the tenant, the latter holds over, the remaindermen as owners may treat him as a trespasser, or elect to treat him as a tenant at will, and in such case he is liable for the use and occupation of the premises, according to the terms of the prior lease. Hinton v. Bogart, (1915) 166 App. Div. 155, 151 N. Y. S. 796.

Lease of oil and mineral lands.—A lease of lands for the purpose of prospecting for oil and minerals thereon has been held to constitute a chattel real, and not an estate of inheritance which would pass to the heirs of the lessee on his death. Buck v. Cleveland, (1911) 143 App. Div. 874, 128 N. Y. S. 864.

Tenancy at will.—A tenancy at will is an estate in land. Matter of Rourke, (1910) 139 App. Div. 155, 123 N. Y. S. 720, affirmed without opinion (1911) 202 N. Y. 604, 96 N. E. 1129. And where one enters upon land by permission of the owner for an indefinite period, even without the reservation of any rent, he is by implication of law a tenant at will. If he is placed upon the land as a mere occupant, without any term prescribed or rent reserved, he is strictly a tenant at will. Larned v. Hudson, (1875) 60 N. Y. 102; Sarsfield v. Healy, (1867) 50 Barb. 245; Post v. Post, (1852) 14 Barb. 253. See *infra*, §§ 228-230.

Tenant by sufferance.—At common law a tenant who held over after the expiration of his term became a tenant by sufferance. He had only a naked possession, and no estate which he could transfer or transmit. He stood in no privity to his landlord, was not liable to pay any rent and was not entitled to any notice to quit. He held by the laches of the landlord, who could enter and put an end to the tenancy when he pleased, and this is still the law, except as modified by statute. Smith v. Littlefield, (1873) 51 N. Y. 539; Livingston v. Tanner, (1856) 14 N. Y. 64, reversing 12 Barb. 481; Jackson v. McLeod, (1815) 12 Johns. 182; Jackson v. Parkhurst, (1809) 5 Johns. 128. See *infra*, §§ 228-230.

Cited.—This section was cited in dissenting opinion by Follett, J., in Parish v. Rogers, (1897) 20 App. Div. 279, 46 N. Y. S. 1058.

§ 31. Estates in fee simple and fee simple absolute. An estate of inheritance continues to be termed a fee simple, or fee, and when not defeasible or conditional, a fee simple absolute, or an absolute fee.

This section was derived from Real Property Law of 1896, § 21.

Section 31 of the Real Property Law of 1896 is now covered by section 41.

When estate for life or years is changed into a fee: see *infra*, § 149.

Certain powers create a fee: see *infra*, § 150.

Nature of term "fee."—The fee is the greatest interest that can be granted in real estate. It includes title, the right of possession, and the right to use for any purpose which may be lawful. Matter of Brookfield, (1903) 176 N. Y. 138, 68 N. E. 138, reversing 78 App. Div. 520, 79 N. Y. S. 1022, 81 N. Y. S. 10; Canfield v. Ford, (1858) 28 Barb. 336.

"Fee simple" and "fee simple absolute."—The terms "fee simple" and "fee simple absolute" have one and the same meaning. Jackson v. Van Zandt, (1815) 12 Johns. 169. And the words "fee simple absolute," when used in a will, have the effect to convey the whole of the estate which the testator had in the lands disposed of. Matter of Church, (1913) 80 Misc. 447, 142 N. Y. S. 284.

Qualified, base, or determinable fee.—What is termed in law a "qualified, base, or determinable fee" is an interest in land which may continue forever, but is liable to be determined by the election of the parties, or if they cease to occupy the same for a certain specified length of time. Stilwell v. Melrose, (1878) 15 Hun 378. And one seized of a determinable fee may convey the estate, and the grantee will take it accompanied by the same determinable quality which belonged to it in the hands of his grantor. Grout v. Townsend, (1845) 2 Denio 336.

Construction of term "remainder in fee."—A statement in the referee's report and in the interlocutory judgment rendered in a partition suit, that a designated beneficiary under a testamentary trust is entitled to "a remainder in fee" in a specified part of the premises sought to be partitioned, does not import a fee simple absolute or effect any change or enlargement of the beneficiary's interest or estate beyond that given by the will. *Rudd v. Cornell*, (1902) 171 N. Y. 114, 63 N. E. 823, affirming 58 App. Div. 207, 68 N. Y. S. 757.

Two fees simple in same land.—Two fees simple absolute cannot exist at the same time of the same land. *Canfield v. Ford*, (1858) 28 Barb. 336.

Distinction between titles acquired by purchaser and by descent.—A clear distinction has always been recognized in the law of real property, between titles acquired by purchase and titles acquired by descent. The latter vest by operation of law. *Branagh v. Smith*, (1891) 46 Fed. 517. And "in judgment of law, a purchase is the acquisition of land by act of the parties in contradistinction to acquisition by operation of law, and includes title by deed and title by devise." *Daly v. Beer*, (1890) 57 Hun 590 mem., 10 N. Y. S. 893. In *Stamm v. Bostwick*, (1886) 40 Hun 35, affirmed (1890) 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597, it was said that "acquisition by purchase includes every mode of taking title except descent or inheritance." And in *Hall v. Hall*, (1880) 81 N. Y. 130, affirming 13 Hun 306, the court said: "There seems to be no public policy which would justify the inference that the legislature intended to discriminate between a title by deed and by devise."

Fee in mines, ores and minerals.—Mines, ores and minerals being land, one may have a fee simple in them "as well as he who holds the soil that remains unconveyed may have a fee simple." *Canfield v. Ford*, (1858) 28 Barb. 336.

Reservation of rent.—A conveyance of land in fee, reserving an annual rent, has been held to create no tenure between the grantor and grantee; the rights of the grantor in the rent charged upon the land depend upon the covenants and conditions of the deed which run with the land and are wholly independent of tenure. *Van Rensselaer v. Dennison*, (1866) 35 N. Y. 393.

Limitation over.—Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the lifetime of the testator, and that the primary devisee surviving the testator, takes an absolute estate in fee simple. *Vanderzee v. Slingerland*, (1886) 163 N. Y. 47, 8 N. E. 247, 57 A. S. R. 701. See also *Matter of Miller*, (1899) 161 N. Y. 71, 55 N. E. 385, affirming 11 App. Div. 337, 42 N. Y. S. 148; *Chapman v. Moulton*, (1896) 8 App. Div. 64, 40 N. Y. S. 498. And where a limitation over after a devise of a fee simple is void for remoteness or other reason, the fee simple stands as an absolute fee, as though no limitation over had been attempted. *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166. See also *Matter of Clark*, (1902) 38 Misc. 617, 78 N. Y. S. 108. Where the wife takes by devise an estate in fee, limited by an executory devise which defeats or abridges the fee in case of the happening of a certain event, the seizin and estate which she has will give the husband curtesy. The husband's estate is not derived merely out of the estate of the wife, but is created by law, and is tacitly annexed to the gift, and so continues as an incident of the specified event. *Hatfield v. Sneden*, (1873) 54 N. Y. 280.

Limiting a fee after a fee.—Executory devises limiting a fee after a fee, upon some contingency operating to defeat the estate of the first taker, as upon his death without issue or other specified event, have become common forms of assurance. The common law doctrine of repugnancy between the two estates, which was perfectly rational upon the assumption upon which it proceeded, has given way to the more just and reasonable view, which regards the prior gift, although made in words which, standing alone, import an absolute estate, as restrained by the subsequent limitation, and as conferring only a qualified estate. This prior estate, although properly denominated a fee, because it may last forever, is nevertheless a base or determinable fee, because it is liable to be defeated by the happening of the contingency upon which it is limited. In other words, in such a case, as the limitation is construed, an absolute fee is not given to the first taker, but only a qualified and determinable one. *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E.

316, 771, 53 Am. Rep. 166. See also *Leonard v. Burr*, (1858) 18 N. Y. 96; *Norris v. Beyea*, (1855) 13 N. Y. 273; *Loth v. Wykoff*, (1849) 2 N. Y. 355, affirming 1 Barb. 565; *Barlow v. Barlow*, (1849) 2 N. Y. 386. But it was not intended that the Revised Statutes should in any way change the rule that where the entire estate is given with the power absolutely to dispose of it by deed and by will, there is nothing left in the testator upon which a limitation over can take effect. This is but another way of saying that after one has given his entire estate away once, he cannot give it away again. *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5.

Limitation of fee created in will by subsequent clause.—It is well-established doctrine that an estate in fee, created by a will, cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the estate. *Matter of Miller*, (1896) 11 App. Div. 337, 42 N. Y. S. 148, affirmed (1899) 161 N. Y. 71, 55 N. E. 385; *Benson v. Corbin*, (1895) 145 N. Y. 351, 40 N. E. 11, affirming 78 Hun 202; 28 N. Y. S. 963; *Washbon v. Cope*, (1895) 144 N. Y. 287, 39 N. E. 388, reversing 67 Hun 272, 22 N. Y. S. 241; *Byrnes v. Stilwell*, (1886) 103 N. Y. 453, 9 N. E. 241, 57 A. S. R. 760, modifying 38 Hun 523; *Roseboom v. Roseboom*, (1880) 81 N. Y. 356, affirming 15 Hun 309.

Failure to perform condition subsequent.—A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. *Nicoll v. New York, etc., R. C.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460.

Cited.—This section was cited in *Matter of Bensel*, (1910) 140 App. Div. 257, 125 N. Y. S. 128.

§ 32. Estates tail abolished; remainders thereon. Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the law of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.

This section was derived from Real Property Law of 1896, § 22.

Section 32 of the Real Property Law of 1896 is now covered by section 42.

Definition of remainder: see *infra*, § 38.

Barring or defeating estates tail in American jurisdictions: see Ann. Cas. 1912 56 note.

Purpose of section.—In *Wendell v. Crandall*, (1848) 1 N. Y. 491, affirming 2 Denio 9, the court said: "When the legislature was about to abrogate the right of primogeniture, and make other reforms in the law of descents, they found estates tail standing in the way of the new rules which they proposed to establish; and they began the work by abolishing those estates. They did not however annihilate the title to the property, but only changed the nature or quality of the estate, so that it would go to the heirs general of the tenant in tail, instead of the particular heirs designated by the donor. This was, I think, the leading object which the legislature had in view, though the provision which they made served the further purpose of getting rid of the necessity for fines and recoveries as a means of docking the entail. The estate tail was turned into a fee simple." See also *Lott v. Wykoff*, (1849) 2 N. Y. 355, affirming 1 Barb. 565; *Barlow v. Barlow*, (1849) 2 N. Y. 386;

Van Rensselaer v. Poucher, (1847) 5 Denio 35. The statute abolishing entails was intended to except expressly from the effect of the law all estates where a valid remainder was limited. **Buel v. Southwick**, (1877) 70 N. Y. 581. Estates tail are not simply abolished and thrown back to fees conditional at common law. These estates may arise and then are changed into a fee simple. **Wilkes v. Lion**, (1823) 2 Cow. 333.

Rule in Shelley's case.—The substance of the rule in Shelley's case is that when a person, by any gift or conveyance, takes an estate of freehold, and by the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase. This rule was abolished by the Revised Statutes, and this section enlarged an estate tail into a fee. **Brown v. Lyon**, (1852) 6 N. Y. 419; **Alger v. Alger**, (1884) 31 Hun 471.

For an extended note on Shelley's Case, see 29 L. R. A. (N. S.) 963.

For note on whether the word "children" is a word of purchase or of limitation, see 12 L. R. A. (N. S.) 283.

Effect of section upon vested remainders in tail.—It has been held that this section operated upon vested remainders in tail as well as upon estates tail which had taken effect in possession. **Jenkins v. Fahey**, (1878) 73 N. Y. 355, reversing 11 Hun 351. See also **Wendell v. Crandall**, (1848) 1 N. Y. 491, affirming 2 Denio 9.

When devisee takes a fee simple.—In **Coe v. De Witt**, (1880) 22 Hun 428, the testator devised one-third part of his residuary estate to his nephew "and the heirs of his body forever, and in case of his death without issue then living," said part was devised to other devisees. The court held that the nephew took a fee in such part of the real estate. See also **Barnes v. Hathaway**, (1873) 66 Barb. 452; **Emmons v. Cairns**, (1848) 3 Barb. 243. In **Grout v. Townsend**, (1845) 2 Denio 336, the testator after devising lands to his wife during widowhood devised the same lands to his daughter and the heirs of her body forever from and after the decease or remarriage of his wife, with a limitation over to the children of another in case the daughter died without issue. The court held that a remainder in fee tail was attempted to be devised to the daughter, which the statute changed into a remainder in fee simple.

Cited.—This section was cited in **Hacker v. Hacker**, (1912) 153 App. Div. 270, 138 N. Y. S. 194; **Wood v. Taylor**, (1894) 9 Misc. 640, 30 N. Y. S. 433, affirmed without opinion 11 Misc. 713, 31 N. Y. S. 1135; **Matter of Kirk v. Richardson**, (1884) 32 Hun 434.

§ 33. Freehold; chattels real; chattel interests. Estates of inheritance and for life shall continue to be termed estates of freehold; estates for years are chattels real; and estates at will or by sufferance continue to be chattel interests, but not liable as such to sale on execution.

This section was derived from Real Property Law of 1896, § 23.

Section 33 of the Real Property Law of 1896 is now covered by section 43.

Enumeration of estates in real property: see *supra*, § 30.

Limitations of chattels real: see *infra*, § 49.

Term "real property" as including chattels real: see *infra*, § 290, subd. 1.

Meaning of term "chattels" generally: see GENERAL CONSTRUCTION LAW, § 15.

Rights under lease or contract to produce petroleum oil as personal property: see GENERAL CONSTRUCTION LAW, § 39.

Estates for life and leases for years as assets of decedent: see Code Civ. Pro., § 2672.

Chattels real as bound by judgment: see Code Civ. Pro., § 1251.

Term "real property" as including leaseholds in relation to execution sale of realty: see Code Civ. Pro., § 1430.

Section as declaratory of former rule.—The section is merely declaratory of the former existing rule of law. **Putnam v. Westcott**, (1821) 19 Johns. 73.

Estates for years.—Estates for years are denominated estates in land and are chattels real. *Despard v. Churchill*, (1873) 53 N. Y. 192; *Bennett v. Crain*, (1886) 41 Hun 183, 4 N. Y. St. Rep. 158; *Blanchard v. Blanchard*, (1875) 4 Hun 287, 6 Thomp. & C. 551, affirmed without opinion (1877) 70 N. Y. 615; *Broman v. Young*, (1885) 35 Hun 173; *O'Rourke v. Henry Prouse Cooper Co.*, (1886) 11 Civ. Pro. 321; *Averill v. Taylor*, (1853) 8 N. Y. 44; *Op. Atty.-Gen.* (1899) 275.

Leasehold interest for term of years.—A leasehold interest in real estate for a term of years is a chattel real. *Westchester Trust Co. v. Hobby Bottling Co.*, (1905) 102 App. Div. 464, 92 N. Y. S. 482, affirmed without opinion (1906) 185 N. Y. 577, 78 N. E. 1114; *Matter of Ehrsam*, (1899) 37 App. Div. 272, 55 N. Y. S. 942; *State Trust Co. v. Casino Co.*, (1897) 19 App. Div. 344, 46 N. Y. S. 492; *Burr v. Stenten*, (1868) 52 Barb. 377, affirmed (1871) 43 N. Y. 462. Leases for years have a definite legal character as chattels. Although called estates in land they have none of its characteristics. Originally the only remedy for ouster was an action for damages. They did not formerly, nor do they now, pass to the heir, but to the personal representative. In the absence of statute they may be transferred without any of the formalities required for the conveyance of realty. *Matter of Althause*, (1901) 63 App. Div. 252, 71 N. Y. S. 445, affirmed without opinion (1901) 168 N. Y. 670, 61 N. E. 1127.

Lease of oil and mineral lands.—A lease of lands for the purpose of prospecting for oil and minerals thereon has been held to constitute a chattel real, and not an estate of inheritance which would pass to the liens of the lessee on his death. *Buck v. Cleveland*, (1911) 143 App. Div. 874, 128 N. Y. S. 864. See also *Broman v. Young*, (1885) 35 Hun 173. See generally, 42 L. R. A. (N. S.) 472 note. As to oil wells, see *supra*, § 2 note.

Chattel mortgage on lease.—As a lease on real estate is a chattel real it is not the proper subject for a chattel mortgage. *In re Fulton*, (1907) 153 Fed. 664.

As to right of lessee for years of premises upon which trees stand to maintain an action under section 1667 of the Code of Civil Procedure for treble damages for the cutting down of trees and for trespass, see *Lewis v. Thompson*, (1896) 3 App. Div. 329, 38 N. Y. S. 316.

Effect of judgment upon chattels real.—A judgment binds and is a charge upon the chattels real of every person against whom the judgment is rendered. *People v. McAdam*, (1881) 84 N. Y. 287, reversing 22 Hun 559; *Despard v. Churchill*, (1873) 53 N. Y. 192.

Estates for years may be sold on execution, as real estate. *Averill v. Taylor*, (1853) 8 N. Y. 44.

The estate of a lessee for years may be sold on execution. *Burr v. Stenten*, (1871) 43 N. Y. 462, affirming 52 Barb. 377. The contrary was held in *Matter of Ehrsam*, (1899) 37 App. Div. 272, 55 N. Y. S. 942, wherein the court said: "The interest of a tenant of realty under a lease for years is not real estate, but is a chattel real, and is not liable to sale on an execution." And it has been held that a leasehold interest in real property of a judgment debtor, which had less than three years to run, although the lease was originally for ten years, was not real property within the provision of the code relating to the sale of real property under execution, and that it might therefore be sold under execution as personal property. *O'Rourke v. Henry Prouse Cooper Co.*, (1886) 11 Civ. Pro. 321.

But a mere tenant at will or by sufferance has no interest which is subject to sale on execution. *Dickinson v. Smith*, (1857) 25 Barb. 102; *Bigelow v. Finch*, (1853) 17 Barb. 394; *Bigelow v. Finch*, (1851) 11 Barb. 498; *Colvin v. Baker*, (1848) 2 Barb. 206; *Brewster v. Striker*, (1852) 1 E. D. Smith 321, affirmed (1848) 2 N. Y. 19, 5 How. Pr. 40.

Cited.—This section was cited in *Hinton v. Bogart*, (1915) 166 App. Div. 155, 151 N. Y. S. 796; *People v. State Board Tax Comm'rs*, (1912) 153 App. Div. 532, 138 N. Y. S. 344.

§ 34. When estate for life of third person is freehold; when chattel real. An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only

during the life of the grantee or devisee; after his death it shall be deemed a chattel real.

This section was derived from Real Property Law of 1896, § 24.

Section 34 of the Real Property Law of 1896 is now covered by section 44.

Proceedings to discover death of life tenant: see Code Civ. Pro., § 2302 et seq.

Presumption of death of person on whom life estate depends.—At common law seven years' absence of a person without intelligence concerning him rebutted the presumption of a continuance of his life and raised a presumption of his death. *Ruoff v. Greenpoint Sav. Bank*, (1903) 40 Misc. 549, 82 N. Y. S. 881. Where persons disappear without any explanation other than the supposition that they intended to commit suicide, the presumption after the expiration of seven years is that they are dead. *Matter of Losee*, (1905) 46 Misc. 363, 94 N. Y. S. 1082, affirmed 119 App. Div. 107, 94 N. Y. S. 1082, 104 N. Y. S. 1132; *McNulty v. Mitchell*, (1903) 41 Misc. 293, 84 N. Y. S. 89; *Matter of Allen*, (1889) 24 N. Y. St. Rep. 251, 5 N. Y. S. 566; *Eagle v. Emmet*, (1856) 4 Bradf. 117. And see L. R. A. 1915B 729 note; Ann. Cas. 1916B 67 note. Where persons perish in a common disaster there is no presumption of survivorship; and, in the absence of satisfactory evidence, the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Newell v. Nichols*, (1878) 75 N. Y. 78, 31 Am. Rep. 424, affirming 12 Hun 604; *Matter of McLunes*, (1907) 119 App. Div. 440, 104 N. Y. S. 147. See generally notes, 14 Ann. Cas. 716; Ann. Cas. 1913A 871; 51 L. R. A. 863.

Section 841 of the Code of Civil Procedure provides that "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time."

As to admissibility of coroner's verdict on issue of survivorship, see Ann. Cas. 1917B 899 note; 45 L. R. A. (N. S.) 408 note.

Adjudication of time of death.—While the court under special circumstances can specifically decree the death to have occurred at some intermediate period, yet in the absence of such determination the time of death will ordinarily date from the decree adjudging the party dead. *Matter of Allen*, (1889) 24 N. Y. St. Rep. 251, 5 N. Y. S. 566; *Matter of Losee*, (1905) 46 Misc. 363, 94 N. Y. S. 1082, affirmed 119 App. Div. 107, 94 N. Y. S. 1082, 104 N. Y. S. 1132.

Estates per autre vie as devisable.—Estates per autre vie were not, at common law, deemed devisable, but they now pass under a general devise. If not devised they go for distribution as personal estate. *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, (1885) 37 Hun 9; *Reynolds v. Collin*, (1842) 3 Hill 441; *Gillis v. Brown*, (1826) 5 Cow. 388.

Estate per autre vie on death of owner.—On the death of an owner, an estate per autre vie becomes a chattel real, and goes as an asset to the executor or administrator to be applied and distributed as part of the personal estate of the testator or intestate. *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, (1885) 37 Hun 9; *Reynolds v. Collin*, (1842) 3 Hill 441; *Gillis v. Brown*, (1826) 5 Cow. 388.

Cited.—This section was cited in dissenting opinion by Follett, J., in *Parish v. Rogers*, (1897) 20 App. Div. 279, 46 N. Y. S. 1058.

§ 35. Estates in possession and expectancy. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. An estate which entitles the owner to immediate possession of the property, is an estate in possession.

An estate, in which the right of possession is postponed to a future time, is an estate in expectancy.

This section was derived from Real Property Law of 1896, § 25.

Section 35 of the Real Property Law of 1896 is now covered by section 45.

When future estates are vested and when contingent: see infra, § 40.

Power of appointment not to prevent vesting: see infra, § 41.

When expectant estates are defeated: see infra, § 57.

Qualities of expectant estates: see infra, § 59.

When expectant estates are deemed created: see infra, § 64.

Future estates in personal property generally: see PERSONAL PROPERTY LAW, art. 2.

Transfer of expectancy to stranger: see Ann. Cas. 1916E 1241 note.

Binding effect of warranty deed of his expectancy by one who predeceases his ancestor: see L. R. A. 1917C 266.

Scope of expectant estates.—An examination of the several provisions of the former Revised Statutes shows that, by the term "expectant estates," the legislature intended to include every present right or interest, either vested or contingent, which may by possibility vest in possession at a future day. *Lawrence v. Bayard*, (1838) 7 Paige 70; *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175.

Creation of estate in expectancy under a will.—An estate in expectancy is created under a will where the devisees are not entitled to its immediate possession on the death of the testator. *Clark v. Grosh*, (1912) 81 Misc. 407, 142 N. Y. S. 966. See also *Palmer v. Dunham*, (1889) 52 Hun 468, 6 N. Y. S. 46, affirmed (1890) 125 N. Y. 68, 25 N. E. 1081.

Possibility of reverter as expectant estate.—An expectant estate does not include the mere possibility of a reverter, which the grantor has after he has conveyed a fee on a condition subsequent. *Nicoll v. New York, etc., R. Co.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460. See also *Upington v. Corrigan*, (1896) 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, affirming 79 Hun 488, 29 N. Y. S. 1002; *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Towle v. Remsen*, (1877) 70 N. Y. 303. As was said in *Vail v. Long Island R. Co.*, (1887) 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449: "The possibility of reverter merely, is not an estate in land, and until the contingency happens the whole title is in the grantee."

Application to personal property.—As regards estates in expectancy the statute creates an analogy between estates in personal property and estates in real property. *Matter of Harteau*, (1908) 125 App. Div. 710, 110 N. Y. S. 59; *Robinson v. New York Life Ins., etc., Co.*, (1911) 75 Misc. 361, 153 N. Y. S. 257; *Matter of Sutherland*, (1888) 14 N. Y. St. Rep. 84.

Cited.—This section was cited in *Knowlton v. Atkins*, (1892) 134 N. Y. 313, 31 N. E. 914, affirming 56 Hun 408, 10 N. Y. S. 77; *Moore v. Littell*, (1869) 41 N. Y. 66; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Stringer v. Barker*, (1905) 110 App. Div. 37, 96 N. Y. S. 1052, modified (1908) 191 N. Y. 157, 83 N. E. 690; *Richardson v. Hunt*, (1891) 59 Hun 627 *rem.*, 14 N. Y. S. 48, 38 N. Y. St. Rep. 274; *Palmer v. Dunham*, (1889) 52 Hun 468, 6 N. Y. S. 46, affirmed (1890) 125 N. Y. 68, 25 N. E. 1081; *Grout v. Van Schoohoven*, (1844) 1 Sandf. Ch. 336.

§ 36. Enumeration of estates in expectancy. All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into,

1. Future estates; and
2. Reversions.

This section was derived from Real Property Law of 1896, § 26.

Section 36 of the Real Property Law of 1896 is now covered by section 46.

Definition of reversion: see infra, § 39.

Creation of future and contingent estates: see infra, § 50.

When expectant estates are defeated: see infra, § 57.

Qualities of expectant estates: see *infra*, § 59.

When expectant estates are deemed created: see *infra*, § 64.

Future estates in personal property: see PERSONAL PROPERTY LAW, art. 2.

Statutory limitation of estates in expectancy.—All expectant estates except those defined in the statute are abolished, and those defined therein are descendible, devisable and alienable. "If, therefore, one possesses an interest which lacks those attributes of discredibility, devisability, or alienability, it is not such an interest as is recognized by our law." *Robinson v. New York Life Ins., etc., Co.*, (1911) 75 Misc. 361, 133 N. Y. S. 257. And an expectant estate embraces all kinds of future estates and reversions. *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175; *Savage v. Pike*, (1866) 45 Barb. 464; *Lawrence v. Bayard*, (1838) 7 Paige 70. Under the Revised Statutes (1 R. S. 723, § 11) expectant future estates, as defined in the statute included all remainders, whether vested or contingent. *Dodge v. Stevens*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443.

Alienability of expectant estates.—Where a life estate was conveyed with a remainder, "the interest other than the life estate was an estate in expectancy, for it was a future estate, termed a remainder, which could be created and transferred by that name, and as an expectant estate it was descendible, devisable and alienable in the same manner as an estate in possession. *Ray v. Jaeger*, (1909) 131 App. Div. 294, 115 N. Y. S. 737. See also *Baltes v. Union Trust Co.*, (1904) 180 N. Y. 183, 72 N. E. 1005, affirming 74 App. Div. 630, 77 N. Y. S. 1121; *Matter of Pell*, (1902) 171 N. Y. 48, 63 N. E. 789, 89 A. S. R. 791, 57 L. R. A. 540, reversing 60 App. Div. 286, 70 N. Y. S. 196; *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Moore v. Littel*, (1869) 41 N. Y. 66; *Hume v. Fleet*, (1897) 23 App. Div. 185, 48 N. Y. S. 889; *Robinson v. New York Life Ins., etc., Co.*, (1911) 75 Misc. 361, 133 N. Y. S. 257. And there is no doubt that a contingent interest in real property is alienable. *Hills v. Flynn*, (1914) 161 App. Div. 127, 146 N. Y. S. 508; *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed (1911) 203 N. Y. 556 mem.; *New York Security, etc., Co. v. Schoenberg*, (1903) 87 App. Div. 262, 84 N. Y. S. 359, affirmed without opinion (1904) 177 N. Y. 556, 69 N. E. 1128.

As to descendibility, devisability and alienability of expectant estates generally, see *infra*, § 59 notes.

Substitution of expectant estates for executory devises.—Executory devises are abolished and expectant estates are substituted in their place. *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382. See also *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166; *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201, modifying and affirming 30 Hun 605. Nor will the court construe a limitation into an executory devise when it may take effect as a remainder. *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Miller v. Van Schwarzenstein*, (1900) 51 App. Div. 18, 64 N. Y. S. 475. See also *Webel v. Kelly*, (1906) 111 App. Div. 521, 97 N. Y. S. 1009.

Application to personal property.—There is manifest propriety in assimilating, as far as possible, the rules applicable to both personal and real property, "and the courts have gradually assimilated most of the rules governing the incidents of future estates in real property to those applicable to future interests in personal property." *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed (1911) 203 N. Y. 556 mem.

Reversion of trust of personal property.—Where a trust deed conveying personal property reserves to the grantor the reversion of the trust fund in the event of the death of the beneficiary, leaving no issue, such reversion constitutes an estate in expectancy which, under section 59, *infra*, "is descendible, devisable and alienable in the same manner as an estate in possession." The owner of such expectant estate is empowered to deal with the same in all respects as if he were actually in possession of the property representing the estate. *New York Life Ins., etc., Co. v. Cary*, (1908) 191 N. Y. 33, 83 N. E. 598, reversing 120 App. Div. 264, 105 N. Y. S. 125. See also *Farmers' Loan, etc., Co. v. Bostwick*, (1908) 190 N. Y. 569, 83 N. E. 1124, reversing 120 App. Div. 271, 105 N. Y. S. 130.

Cited.—This section was cited in *Clowe v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105; *Bailey v. Bailey*, (1884) 97 N. Y. 260; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Rudd v. Cornell*, (1901) 58 App. Div. 207, 68 N. Y. S. 757, affirmed (1902) 171 N. Y. 114, 63 N. E. 823; *Clark v. Grosh*, (1912) 81 Misc. 407, 142 N. Y. S. 966; *Schell v. Carpenter*, (1906) 50 Misc. 400, 100 N. Y. S. 554, affirmed 116 App. Div. 914, affirmed (1907) 190 N. Y. 552 mem.; *Richardson v. Hunt*, (1891) 59 Hun 627 mem., 14 N. Y. S. 48.

§ 37. Definition of future estates. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

This section was derived from Real Property Law of 1896, § 27.

Section 37 of the Real Property Law of 1896 is now covered by section 47.

Qualities of expectant estates: see *infra*, § 59.

Future estates in personal property: see PERSONAL PROPERTY LAW, § 11 et seq.

Protection of owners of future estates in partition actions: see Code Civ. Pro., § 1570.

Purpose of section.—The section is a reproduction of a similar provision contained in the Revised Statutes (1 R. S. 723, § 10), “and was intended to sweep away certain artificial rules with respect to the limitation of estates no longer required by public policy, or, under modern conditions, having any support in reason.” *Jessup v. Pringle Memorial Home*, (1899) 27 Misc. 427, 59 N. Y. S. 207, affirmed 47 App. Div. 622, 62 N. Y. S. 308.

Future estate as alienable.—A future or expectant estate is descendible, devisable and alienable in the same manner as an estate in possession. *Baltes v. Union Trust Co.*, (1904) 180 N. Y. 183, 72 N. E. 1005, affirming 74 App. Div. 630, 77 N. Y. S. 1121; *Matter of Pell*, (1902) 171 N. Y. 48, 63 N. E. 789, 89 A. S. R. 791, 57 L. R. A. 540, reversing 60 App. Div. 286, 70 N. Y. S. 196; *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Moore v. Littel*, (1869) 41 N. Y. 66; *Ray v. Jaeger*, (1909) 131 App. Div. 294, 115 N. Y. S. 737; *Stringer v. Barker*, (1905) 110 App. Div. 37, 96 N. Y. S. 1052, modified on another point (1908) 191 N. Y. 157, 83 N. E. 690; *New York Security, etc., Co. v. Schoenberg*, (1903) 87 App. Div. 262, 84 N. Y. S. 359, affirmed (1904) 177 N. Y. 556, 69 N. E. 1128.

Devise to person not in existence.—A gift or devise to a person not then in existence creates a future estate. *Rasquin v. Hamersley*, (1912) 152 App. Div. 522, 137 N. Y. S. 578, affirmed (1913) 208 N. Y. 630 mem.

Relation to executory devises.—Executory devises are abolished and expectant estates are substituted in their place, and such estates, when the contingency happens upon which they are limited, vest by force of the instrument creating them, and this right in the expectant cannot be defeated by any person. *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382. And an estate in expectancy corresponds in the main with what was known to the common law as an executory devise. *Adami v. Gercken*, (1914) 164 App. Div. 472, 150 N. Y. S. 8. See also *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *Leonard v. Burr*, (1858) 18 N. Y. 96.

Application of section to personal property.—There is manifest propriety in assimilating, as far as possible, the rules applicable to both real and personal property, and the courts have gradually assimilated most of the rules governing the incidents of future estates in real property to those applicable to future interests in personal property. *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed (1911) 203 N. Y. 556 mem.

Cited.—This section was cited in *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Clark v. Grosh*, (1912) 81 Misc. 407, 142 N. Y. S. 966; *Schell v. Carpenter*, (1906) 50 Misc. 400, 100 N. Y. S. 554, affirmed 116 App. Div. 914, affirmed (1907) 190 N. Y. 914; *Ogden v. Ogden*,

(1903) 40 Misc. 473, 82 N. Y. S. 710; *Matter of Bray*, (1907) 118 App. Div. 533, 102 N. Y. S. 989; *Eells v. Lynch*, (1861) 8 Bosw. 465.

The section was cited in the case of *In re McQueen's Will*, (1917) 163 N. Y. S. 287, as bearing on the so-called divide and pay rule. See *infra*, § 40 note.

§ 38. Definition of remainder. Where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

This section was derived from Real Property Law of 1896, § 28.

Section 38 of the Real Property Law of 1896 is now covered by section 48.

Remainders as assets in bankruptcy: see 47 L. R. A. (N. S.) 284.

Remainder as reachable by creditors' bill: see Ann. Cas. 1914B 954 note.

When remainder not limited on contingency defeating precedent estate takes effect: see *infra*, § 55.

Qualities of expectant estates: see *infra*, § 59.

Other definitions of remainder.—A remainder has been defined to be “a remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgement of it.” And it has also been defined as an estate or interest to take effect in possession or enjoyment, immediately upon the termination of a prior estate. *Matter of Dobson*, (1911) 73 Misc. 170, 132 N. Y. S. 472.

Expectant future estates as including remainders.—Expectant future estates expressly include all remainders, whether vested or contingent, and, under section 59, are descendible, devisable and alienable. *Clowe v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105; *Baltes v. Union Trust Co.*, (1904) 180 N. Y. 183, 72 N. E. 1005, affirming 74 App. Div. 630, 77 N. Y. S. 1121; *Matter of Pell*, (1902) 171 N. Y. 48, 63 N. E. 789, 89 A. S. R. 791, 57 L. R. A. 540, reversing 60 App. Div. 286, 70 N. Y. S. 196; *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Dodge v. Stevens*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443; *Moore v. Littel*, (1869) 41 N. Y. 66; *Hills v. Flynn*, (1914) 161 App. Div. 127, 146 N. Y. S. 508; *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed (1911) 203 N. Y. 556 mem.

Deed and lease as constituting remainder.—Where a decedent in her lifetime conveyed the principal part of her estate to her cousin upon the latter's promise to give her certain care, and also to execute her a lease, without rent, for her life, of all the property conveyed, which the latter executed at the time of the execution of the conveyance, and it appeared by the circumstances of the transaction to have been the intention that the disposition of her property by the decedent should not take effect until after her death, such deed and lease were held to constitute one agreement, from which arose an estate in land dependent upon a prior estate created at the same time by the same instrument, and hence a remainder. *Matter of Dobson*, (1911) 73 Misc. 170, 132 N. Y. S. 472.

Conveyance of life estate with remainder to same person.—Where a conveyance was made to E. for life, with a proviso that should the estate terminate during the lifetime of E. the remainder was to pass to N. for the residue of E.'s life, and it was further provided that on the death of E. the remainder should go to him and his heirs, it was held that the conveyance vested E. with both the life estate and the remainder. *Ray v. Jaeger*, (1909) 131 App. Div. 294, 115 N. Y. S. 737.

Gift to person not in existence.—In *Rasquin v. Hamersley*, (1912) 152 App. Div. 522, 137 N. Y. S. 578, affirmed (1913) 208 N. Y. 630 mem., the testator, after giving all his estate to his executors in trust to receive the income and apply it to the use of his wife during her life, with remainder to his issue per stirpes, provided as follows: “In the event, however, no issue of mine shall survive my said wife, then, on her decease, I give, devise and bequeath my said estate, real and personal, to the male issue of my cousin J. Hooker Hamersley then living, and to the male issue of such of them as shall have previously died leaving issue, such issue to take the share which

his, her or their parent would have taken if living." The testator died without issue, and at the time the will was made and at the time of the testator's death, the said Hamersley was unmarried. The court held that the gift to his issue was to persons not then in existence, and was, therefore, a future estate, and, since it was dependent upon the precedent life estate to the wife, it was a contingent remainder.

Cited.—This section was cited in *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21; *Powers v. Bergen*, (1852) 6 N. Y. 358; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879.

§ 39. Definition of reversion. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of one or more particular estates granted or devised.

This section was derived from Real Property Law of 1896, § 29.

Section 39 of the Real Property Law of 1896 is now covered by section 49.

Reversion of a power: see *infra*, § 144.

Reversion when father inherits: see DECEDENT ESTATE LAW, § 84 notes.

Reversion when mother inherits: see DECEDENT ESTATE LAW, § 85 notes.

Reversion on breach of condition subsequent: see L. R. A. 1917C 879 note.

Effect of alienation of fee.—There can be no reversion where the grantor or testator has parted with the fee. *Nicoll v. New York, etc., R. Co.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460. And a reservation is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent, or some right to be exercised in relation to the estate, such as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted, or described as granted, and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted. *Craig v. Wells*, (1854) 11 N. Y. 315.

Conveyance upon condition subsequent.—When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until a breach of the condition and a re-entry by the grantor. The possibility of reverter, merely, is not an estate in land, and until the contingency happens the whole title is in the grantee. *Upington v. Corrigan*, (1896) 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, affirming 79 Hun 488, 29 N. Y. S. 1002; *Vail v. Long Island R. Co.*, (1887) 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449; *Craig v. Wells*, (1854) 11 N. Y. 315; *Kenney v. Wallace*, (1881) 24 Hun 478. Where, by a conveyance to a railroad corporation, land was granted upon the condition that it should construct its road thereon within a limited time, it was held that the condition was subsequent, and that title to the land vested in the corporation on the execution of the deed, and that a mere failure to perform such a condition did not divest the title, as there had to be an entry or its equivalent by the grantor or his heirs for a breach of the condition. *Nicoll v. New York, etc., R. Co.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460.

Re-entry for nonpayment of rent.—The right of re-entry for nonpayment of rent is not a reversion or possibility of reversion in the grantor, but is a mere right of action. *De Peyster v. Michael*, (1852) 6 N. Y. 467, 57 Am. Dec. 470. See also *Overbagh v. Patrie*, (1850) 8 Barb. 28, affirmed (1852) 6 N. Y. 510.

Who can enforce breach of condition.—No one can take advantage of the breach of a condition subsequent annexed to the grant of a fee but the grantor or his heirs, or, in the case of an artificial person, its successors. *Upington v. Corrigan*, (1896) 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, affirming 79 Hun 488, 29 N. Y. S. 1002. And it is well settled that an exception or reservation to a third person, not a party to the instrument, is void; and the same is true of a condition in favor of a stranger to the deed. *Craig v. Wells*, (1854) 11 N. Y. 315.

Reverter as descendible.—The possibility of reverter, by the exercise of the right of re-entry, on the happening of a breach of a condition subsequent, annexed to a grant in fee, requiring a re-entry in order to revest the former estate, is not descendible or devisable, either at common law or under the statutes; but, upon the death of the grantor before re-entry it devolves

upon his heirs at law by force of representation and not by descent. *Upington v. Corrigan*, (1896) 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, affirming 79 Hun 488, 29 N. Y. S. 1002; *Craig v. Wells*, (1854) 11 N. Y. 315; *Kenney v. Wallace*, (1881) 24 Hun 478.

Effect of habendum clause.—Ordinarily, if there is an irreconcilable inconsistency between the premises or granting clause in a deed and the habendum (which is not essential to the validity of a deed), the habendum must yield. *Wood v. Taylor*, (1894) 9 Misc. 640, 30 N. Y. S. 433, affirmed 11 Misc. 713, 31 N. Y. S. 1135; *Kenney v. Wallace*, (1881) 24 Hun 478. Where the granting clause of a deed purported to convey the entire fee of the premises, but the habendum stated that the grantee was to hold for and during his natural life only, and at his death the property should go to his lawful heirs, but in case of his death without lawful issue it should revert to the grantor, his heirs and assigns, and the grantee never had issue, it was held that the words "lawful heirs" meant the grantee's lawful children, that there being no person in being at the delivery of the deed answering to the description of lawful issue who would have been entitled to immediate possession if the grantee had then died, the limitation over was void, that the habendum clause was repugnant to and irreconcilably inconsistent with the granting clause, and that, therefore, the conveyance was of the entire fee. *Wood v. Taylor*, (1894) 9 Misc. 640, 30 N. Y. S. 433, affirmed 11 Misc. 713, 31 N. Y. S. 1135.

Reversionary interest in personality.—Where a reversionary interest in personal property is not disposed of by the will of the testator, it does not necessarily belong to those who may happen to be his next of kin at the termination of the particular estate or interest in such property which is bequeathed by him, but, as an interest in the property undisposed of by the will, it belongs to the widow and next of kin of the decedent who were entitled to the distributive share in such unbequeathed interest at the death of the testator. *Clark v. Cammann*, (1899) 160 N. Y. 315, 54 N. E. 709, affirming 14 App. Div. 127, 43 N. Y. S. 575; *Matter of Kane*, (1847) 2 Barb. Ch. 375; *Hoes v. Van Hoesen*, (1846) 1 Barb. Ch. 379.

§ 40. When future estates are vested; when contingent. A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

This section was derived from Real Property Law of 1896, § 30.

Section 40 of the Real Property Law of 1896 is now covered by section 50.

When expectant estates are defeated: see *infra*, § 57.

Qualities of expectant estates: see *infra*, § 59.

Limitations of future or contingent interests in personal property: see PERSONAL PROPERTY LAW, § 11.

Vested remainder defined.—A vested remainder has been defined to be a fixed interest to take effect in possession after a particular estate is spent. If it be uncertain whether the use or estate limited in future shall ever vest, that use or estate is said to be in contingency. But, though it may be uncertain whether a remainder will ever take effect in possession, it will, nevertheless, be a vested remainder if the interest be fixed. *Williams v. Peabody*, (1876) 8 Hun 271.

Distinction between vested and contingent remainder.—It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder, and it is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest. *Williams v. Peabody*, (1876) 8 Hun 271.

"Immediate right to the possession."—In *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805, the court, in speaking of the "immediate right," referring to this section, said that "it exists by force of some gift in remainder made directly by the grantor or testator, and it would not be, strictly speaking, an 'immediate right,' if the estate could only come in the future by operation of the statute, or by a conveyance under the power." And the rule of construction for the purpose of determining whether a remainder under a devise shall become vested or not, has been made dependent upon the fact whether the person or persons, to whom it may be devised, would have the right to enter at once into its possession and enjoyment upon the decease of the life tenant. *Drake v. Lawrence*, (1879) 19 Hun 112.

Uncertainty of person and event.—If the person to take were certain, and the event uncertain, the contingent interest or estate would never vest in possession, unless the event happened. The statute makes no distinction between uncertainty of person and uncertainty of event, and there is no sound reason to make such a distinction with respect to the alienability of contingent interests. Whatever the uncertainty, they are defined by the statutes as estates. *Clove v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105.

General rule of testamentary construction.—"Courts should endeavor, by every reasonable intendment and by a liberal construction, to sustain a testamentary disposition of property when, in so doing, they can give actual and just effect to the testator's purpose and validate at least the main, if not the true part of a testamentary scheme, which contemplates distinct and severable acts. If the principal disposition can be upheld, we should disregard ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property." *Henderson v. Henderson*, (1889) 113 N. Y. 1, 20 N. E. 814, reversing 46 Hun 509. See also *Stokes v. Weston*, (1894) 142 N. Y. 433, 37 N. E. 515, reversing 69 Hun 608, 24 N. Y. S. 26; *Heath v. Hewitt*, (1891) 127 N. Y. 166, 27 N. E. 959, 24 A. S. R. 438, 13 L. R. A. 46, affirming 49 Hun 12, 1 N. Y. S. 492; *Hard v. Ashley*, (1890) 117 N. Y. 606, 23 N. E. 177, reversing 53 Hun 112, 6 N. Y. S. 69; *Purdy v. Hayt*, (1883) 92 N. Y. 446; *Low v. Harmony*, (1878) 72 N. Y. 408.

Expectant estates as alienable.—While the contingency may be such that the interest or estate is not transmissible, descendible or devisable, yet so far as the nature of the contingency admits all expectant estates are descendible, devisable and alienable. (See *infra*, § 59.) *Clove v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105; *Dodge v. Stevens*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443; *Crooke v. Kings County*, (1884) 97 N. Y. 421; *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201, modifying 30 Hun 605; *Hennessey v. Patterson*, (1881) 85 N. Y. 91; *Kelso v. Lorillard*, (1881) 85 N. Y. 177, affirming 8 Daly 300; *Moore v. Littel*, (1869) 41 N. Y. 66; *Hills v. Flynn*, (1914) 161 App. Div. 127, 146 N. Y. S. 508; *New York Security, etc., Co. v. Schoenberg*, (1903) 87 App. Div. 262, 84 N. Y. S. 359, affirmed without opinion (1904) 177 N. Y. 556, 69 N. E. 1128; *Pickert v. Windecker*, (1893) 73 Hun 476, 26 N. Y. S. 437; *Ramsay v. De Remer*, (1892) 65 Hun 212, 20 N. Y. S. 143; *Leslie v. Marshall*, (1860) 31 Barb. 560; *Delafield v. Schuchardt*, (1884) 2 Dem. 435; *Tregoning v. Tregoning*, (1891) 38 N. Y. St. Rep. 105, 15 N. Y. S. 171, affirmed 39 N. Y. St. Rep. 426, 15 N. Y. S. 171.

Vested or contingent remainders of personal property.—There is no distinction between remainder interests in personal property and remainder interests in real property, and the rules of law relating to vested or contingent remainders of real property apply to bequests of personalty. *Stringer v. Young*, (1908) 191 N. Y. 157, 83 N. E. 690, modifying 110 App. Div. 37, 96 N. Y. S. 1052; *Haug v. Schumacher*, (1901) 166 N. Y. 506, 60 N. E. 245, modifying 50 App. Div. 562, 64 N. Y. S. 310; *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed without opinion (1911) 203 N. Y. 556, 96 N. E. 1122; *Matter of Gurnee*, (1914) 84 Misc. 324, 147 N. Y. S. 396; *Vanderpoel v. Burke*, (1909) 63 Misc. 545, 118 N. Y. S. 548; *Woodruff v. Woodruff*, (1911) 72 Misc. 249, 129 N. Y. S. 860; *Matter of Ryder*, (1904) 43 Misc. 476, 89 N. Y. S. 460; *Ogden v. Ogden*, (1903) 40 Misc. 473, 82 N. Y. S. 710; *Matter of Davis*, (1895) 91 Hun 53, 36 N. Y. S. 822, affirmed (1896) 149 N. Y. 539, 44 N. E. 185; *Barker v. Southerland*, (1886) 6 Dem. 220. But see *Brooklyn Trust Co. v. Phillips*, (1909) 134 App. Div. 697, 119 N. Y. S. 401, affirmed without opinion (1911) 201 N. Y. 561, 95 N. E. 1124.

Vesting of estates favored.—It is a well-settled principle that the law favors the vesting of estates, and unless a contrary intention is unequivocally expressed it will not be imputed. *Connelly v. O'Brien*, (1901) 166 N. Y. 406, 60 N. E. 20, reversing 40 App. Div. 574, 58 N. Y. S. 45; *Stokes v. Weston*, (1894) 142 N. Y. 433, 37 N. E. 515, reversing 69 Hun 608, 24 N. Y. S. 26; *Bowditch v. Ayrault*, (1893) 138 N. Y. 222, 33 N. E. 1067, modifying 63 Hun 23, 17 N. Y. S. 281; *Vanderpoel v. Burke*, (1909) 63 Misc. 545, 118 N. Y. S. 548; *Miller v. Von Schwarzenstein*, (1900) 51 App. Div. 18, 64 N. Y. S. 475; *Guyer v. Guyer*, (1896) 5 App. Div. 156, 38 N. Y. S. 1097, affirmed without opinion (1899) 160 N. Y. 659, 55 N. E. 1095; *Crossman v. Crossman*, (1887) 6 Dem. 148. Nor should a remainder be considered contingent in any case where it may vest consistently with the intention of the testator. *McGillis v. McGillis*, (1898) 154 N. Y. 532, 49 N. E. 145, modifying 11 App. Div. 359, 42 N. Y. S. 921; *Hersee v. Simpson*, (1897) 154 N. Y. 496, 48 N. E. 890, affirming 20 App. Div. 100, 46 N. Y. S. 755; *Embury v. Sheldon*, (1877) 68 N. Y. 227; *Cogan v. McCabe*, (1898) 23 Misc. 739, 52 N. Y. S. 48; *Moore v. Lyons*, (1840) 25 Wend. 119; *Hopkins v. Hopkins*, (1874) 1 Hun 352. And a construction resulting in intestacy should, if possible, be avoided. *Matter of Russell*, (1901) 168 N. Y. 169, 61 N. E. 166, affirming 59 App. Div. 242, 69 N. Y. S. 563; *Hutchings v. Hutchings*, (1911) 144 App. Div. 757, 129 N. Y. S. 622, affirmed (1913) 210 N. Y. 539. See also *Lamb v. Lamb*, (1892) 131 N. Y. 227, 30 N. E. 133; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5; *Smith v. Smith*, (1898) 31 App. Div. 598, 52 N. Y. S. 165. But the rule favoring the vesting of estates was adopted by courts as a guide to the probable intention of testators, and is never applied when that intention, as gathered from the entire instrument, is that the estate shall not vest. *Lewisohn v. Henry*, (1904) 179 N. Y. 352, 72 N. E. 239, affirming 92 App. Div. 532, 87 N. Y. S. 325; *Matter of Crane*, (1900) 164 N. Y. 71, 58 N. E. 47, reversing 36 App. Div. 468, 55 N. Y. S. 822; *Matter of Brown*, (1897) 154 N. Y. 313, 48 N. E. 537, affirming *Matter of Merriman*, (1895) 91 Hun 120, 36 N. Y. S. 131; *Richards v. Hartshorne*, (1906) 110 App. Div. 650, 97 N. Y. S. 754; *Sage v. Wheeler*, (1896) 3 App. Div. 38, 37 N. Y. S. 1107, affirmed without opinion (1899) 158 N. Y. 679, 52 N. E. 1126; *Mitchell v. Knapp*, (1889) 54 Hun 500, 8 N. Y. S. 40, affirmed without opinion (1891) 124 N. Y. 654, 27 N. E. 413.

Test as to vesting.—The test as to vesting was stated in *Moore v. Littel*, (1869) 41 N. Y. 66, as follows: "If you can point to a man, woman or child now, if the life estate should now cease, would, eo instanti et ipso facto, have an immediate right of possession, then the remainder is vested." See also *Dougherty v. Thompson*, (1901) 167 N. Y. 472, 60 N. E. 760, affirming 54 App. Div. 456, 67 N. Y. S. 200; *Powers v. Bergen*, (1852) 6 N. Y. 358; *Knapp v. Clark*, (1914) 84 Misc. 205, 146 N. Y. S. 926; *Genunge v. Murphy*, (1908) 59 Misc. 381, 112 N. Y. S. 310; *Schell v. Carpenter*, (1906) 50 Misc. 400, 100 N. Y. S. 554, affirmed 116 App. Div. 914, 101 N. Y. S. 1142, which was affirmed without opinion by (1908) 190 N. Y. 552, 83 N. E. 1131; *Doscher v. Wyckoff*, (1908) 113 N. Y. S. 655; *Minot v. Minot*, (1897) 17 App. Div. 521, 45 N. Y. S. 554; *Van Nostrand v. Marvin*, (1897) 16 App. Div. 28, 44 N. Y. S. 679, appeal dismissed (1900) 161 N. Y. 650, 57 N. E. 1127; *Ogden v. Ogden*, (1903) 40 Misc. 473, 82 N. Y. S. 710. An estate is said to be "vested" under the laws of this state, where there are persons who will have an immediate right to possession of the property if the precedent estate therein should now cease according to the terms of the instrument creating it. *Matter of Steinwender*, (1917) 176 App. Div. 517, 163 N. Y. S. 309.

When a devise is made or a legacy given, of which the enjoyment is postponed, the leading inquiry upon which the question of vesting or not vesting is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future or contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like. *Goebel v. Wolf*, (1889) 113 N. Y. 405, 21 N. E. 388, 10 A. S. R. 464. See also *Everitt v. Everitt*, (1864) 29 N. Y. 39, reversing 29 Barb. 112; *Clark v. Grosh*, (1912) 81 Misc. 407, 142 N. Y. S. 966; *Schell v. Carpenter*, (1906) 50 Misc. 400, 100 N. Y. S. 554, affirmed 116 App. Div. 914, 101 N. Y. S. 1142, which was affirmed without opinion by (1908) 190 N. Y. 552, 83 N. E. 1131. Where a contrary intention is not manifested in the will, it is a settled rule of construction

that if futurity is annexed to the substance of the gift the vesting of title is suspended, but that if the gift is absolute and merely the time for payment is postponed the gift is not suspended and the title vests at once. *Fulton Trust Co. v. Phillips*, (1916) 218 N. Y. 573, 113 N. E. 558; *McGillis v. McGillis*, (1898) 154 N. Y. 532, 49 N. E. 145, modifying 11 App. Div. 359, 42 N. Y. S. 921; *Matter of Embree*, (1896) 9 App. Div. 602, 41 N. Y. S. 757, affirmed without opinion (1898) 154 N. Y. 778, 49 N. E. 1096; *Fargo v. Squiers*, (1896) 6 App. Div. 485, 39 N. Y. S. 648, modified on other grounds (1897) 154 N. Y. 250, 48 N. E. 509. Out of this distinction has grown the so-called "divide and pay over rule," which is to the effect that where the only gift lies in the direction to pay or distribute at a future time, the case will not be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. In such cases the gift is future, not immediate, contingent and not vested. *Matter of Crane*, (1900) 164 N. Y. 71, 58 N. E. 47, reversing 36 App. Div. 468, 55 N. Y. S. 822. See also *Dougherty v. Thompson*, (1901) 167 N. Y. 472, 60 N. E. 760, affirming 54 App. Div. 456, 67 N. Y. S. 200; *Matter of Traver*, (1899) 161 N. Y. 54, 55 N. E. 406, modifying 30 App. Div. 261, 51 N. Y. S. 614; *Matter of Brown*, (1897) 154 N. Y. 313, 48 N. E. 537, affirming *Matter of Merriman*, (1895) 91 Hun 120, 36 N. Y. S. 131, affirmed (1897) 154 N. Y. 313; *Matter of Baer*, (1895) 147 N. Y. 348, 41 N. E. 702, affirming *Nathan v. Hendricks*, (1895) 87 Hun 483, 34 N. Y. S. 1016; *Dimmick v. Patterson*, (1894) 142 N. Y. 322, 37 N. E. 109, reversing 66 Hun 492, 21 N. Y. S. 404; *Goebel v. Wolf*, (1889) 113 N. Y. 405, 21 N. E. 388, 10 A. S. R. 464; *Delafield v. Shipman*, (1886) 103 N. Y. 463, 9 N. E. 184, reversing 34 Hun 514; *Delaney v. McCormack*, (1882) 88 N. Y. 174; *Warner v. Durant*, (1879) 76 N. Y. 133. But this rule is subordinate to the primary canon for the construction of wills, that the intention of the testator as collected from the whole instrument must prevail, and, if the application of the subordinate rule would defeat the testator's intention it must give way. *Whitwell v. Whitwell*, (1911) 146 App. Div. 270, 130 N. Y. S. 906; *Matter of Embree*, (1896) 9 App. Div. 602, 41 N. Y. S. 757, affirmed without opinion (1898) 154 N. Y. 778, 49 N. E. 1096. Thus it was said in *Matter of Crane*, (1900) 164 N. Y. 71, 58 N. E. 47, reversing 36 App. Div. 468, 55 N. Y. S. 822: "Where, from the examination of the whole will it is apparent that it was the intention of the testator that the estate should vest in the beneficiaries immediately upon his death, the rule governing where there is merely a direction to divide at a future time must be subordinated to that broader rule which requires that the intention of the testator shall control where it can be ascertained 'within the four corners of the will.'" See also *Roosa v. Harrington*, (1902) 171 N. Y. 441, 64 N. E. 1, affirming 57 App. Div. 631, 68 N. Y. S. 1147; *Runyon v. Grubb*, (1907) 119 App. Div. 17, 103 N. Y. S. 949, affirmed without opinion (1908) 192 N. Y. 586, 85 N. E. 1115; *Cushman v. Cushman*, (1907) 116 App. Div. 763, 102 N. Y. S. 258, affirmed without opinion (1908) 191 N. Y. 505, 84 N. E. 1112; *Richards v. Hartshorne*, (1906) 110 App. Div. 650, 97 N. Y. S. 754; *Carr v. Smith*, (1898) 25 App. Div. 214, 49 N. Y. S. 351, affirmed without opinion (1900) 161 N. Y. 636, 57 N. E. 1106. The status and application of the "divide and pay over rule" was discussed in the case of *In re McQueen's Will*, (1917) 163 N. Y. S. 287, as follows: "The first question to be investigated is whether the interest of the legatees in the corpus of the estate is vested or contingent. This brings us to a consideration of the so-called 'divide and pay over rule,' which rule has been stated as follows: 'Where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate, contingent and not vested.' *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47. This rule, notwithstanding the criticism to which it has recently been subjected (*Dickerson v. Sheehy*, 209 N. Y. 592, 103 N. E. 717), is still recognized. *Fulton Trust Company v. Phillips*, 218 N. Y. 573, 584, 113 N. E. 558. In discussing this rule in *Fulton Trust Company v. Phillips*, supra, the court said: 'Where a contrary intention is not manifested in the will, it is a settled rule of construction that, if futurity is annexed to the substance of the gift, the vesting of title is suspended, but if the gift is absolute, and the time for payment only is postponed, the gift is not suspended, but the title vests at once.' And the court, in the same case, at page 583 of 218 N. Y., at page 560, 113 N. E., said: 'It is a rule which courts will never apply, where to

do so would nullify the express intention of the testator.' It is said there are many exceptions to the rule under consideration. *Matter of Tienken*, 131 N. Y. 391, 409, 30 N. E. 109. Two of these exceptions are stated in the *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47, in substance, as follows: (1) 'If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at death of the testator.' (2) 'Where there are words importing a gift, in addition to the direction to the executors or trustees to pay over, divide, or distribute.' And it seems that the rule under consideration does not apply where there is a gift to the legatee of the income on a fund until the fund is directed to be paid over to such legatee. *Vanderpoel v. Loew*, 112 N. Y. 167, 181, 19 N. E. 481, and cases cited. It was recently said by very eminent authority (see dissenting opinion by Chief Judge Cullen, with whom Judges Gray and Willard Bartlett concur, in *Dickerson v. Sheeby*, 209 N. Y. 592, 103 N. E. 717): 'That a gift by means of a direction to divide or pay over at a future time will not be deemed contingent, so as to fail on death before that time, unless provision is made for a substituted gift in favor of the issue of the first devisee or legatee.'

When estate if vested is defeated.—A contention that a deceased beneficiary who at any time during his life would have had an immediate right to the possession of a share upon the then ceasing of the precedent estate, took a vested estate which passed by his will, cannot be sustained, since if vested it was subject to be and was defeated by his death during the existence of the trust. *Dougherty v. Thompson*, (1901) 167 N. Y. 472, 60 N. E. 760, affirming 54 App. Div. 456, 67 N. Y. S. 200.

Effect of infancy upon vesting.—Where nothing is interposed between a minor and his enjoyment of his estate except his own minority, the estate is vested. And the case becomes stronger when, during such minority, the accruing rents and profits are given to the minor. In such event the gift of the immediate income indicates an intention to vest the corpus from which the income is to be derived. *Van Brunt v. Van Brunt*, (1888) 111 N. Y. 178, 19 N. E. 60; *Robert v. Corning*, (1882) 89 N. Y. 225, affirming 23 Hun 299; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348. See also *Bradley v. Kuhn*, (1884) 97 N. Y. 26, modifying 28 Hun 573; *Bushnell v. Carpenter*, (1883) 92 N. Y. 270, affirming 28 Hun 19; *Roome v. Phillips*, (1862) 24 N. Y. 463.

Survivorship at time of distribution.—Where a future interest is devised, not directly to a given person, but indirectly through the exercise of a power conferred upon executors or trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift. *Matter of Baer*, (1895) 147 N. Y. 348, 41 N. E. 702, affirming *Nathan v. Hendricks*, (1895) 87 Hun 483, 34 N. Y. S. 1016. See also *Delafield v. Shipman*, (1886) 103 N. Y. 463, 9 N. E. 184, reversing 34 Hun 514; *Shipman v. Rollins*, (1885) 98 N. Y. 311; *Smith v. Edwards*, (1882) 88 N. Y. 92, affirming 23 Hun 223; *Delaney v. McCormack*, (1882) 88 N. Y. 174; *Everitt v. Everitt*, (1864) 29 N. Y. 39, reversing 29 Barb. 112; *Brooklyn Trust Co. v. Phillips*, (1909) 134 App. Div. 697, 119 N. Y. S. 401, affirmed without opinion (1911) 201 N. Y. 561, 95 N. E. 1124; *Sanson v. Bushnell*, (1898) 25 Misc. 268, 55 N. Y. S. 272. Thus in *Warner v. Durant*, (1879) 76 N. Y. 133, it was said: "Where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives." See also *Shangle v. Hallock*, (1896) 6 App. Div. 55, 39 N. Y. S. 619; *Staples v. Hawes*, (1898) 24 Misc. 475, 53 N. Y. S. 860, affirmed 39 App. Div. 548, 57 N. Y. S. 452. But in order that the interest of the beneficiary may vest at once there must be, in addition to the direction to the executors or trustees, either express words of gift, or circumstances from which may fairly be inferred an intention to appropriate at once the subject of the gift to the use of the beneficiary, although the full enjoyment thereof is postponed to a later date. *Geisse v. Bunce*, (1897) 23 App. Div. 289, 48 N. Y. S. 249.

Effect of words of survivorship.—It is a well settled rule of construction that words of survivorship used in deeds or wills refer to the period of division and enjoyment unless there is an intention to the contrary. *Matter of Mahan*, (1885) 98 N. Y. 372, affirming 32 Hun 73; *Robinson v. New York*

Life Ins., etc., Co., (1911) 75 Misc. 361, 133 N. Y. S. 257. The words "on the death of the survivor" relate to the time of enjoyment and not to the vesting of the estate. *Trowbridge v. Coss*, (1908) 126 App. Div. 679, 110 N. Y. S. 1108, affirmed without opinion (1909) 195 N. Y. 596, 89 N. E. 1114. Where there is a devise or bequest to one person absolutely, and in case of his death to another, it is a settled rule of construction that the words of contingency refer to a death in the lifetime of the testator. The same rule applies where the devise over is not dependent upon the event of death simply, but upon death in connection with some collateral event, as death without issue or without children. *Vanderzee v. Slingerland*, (1886) 103 N. Y. 47, 8 N. E. 247, 57 A. S. R. 701.

Adverbs of time, such as "upon," "then," "from and after," in the devise or bequest of a remainder limited upon a life estate are construed to relate merely to the time of enjoyment of the estate, and not to the time of its vesting in interest. *Connelly v. O'Brien*, (1901) 166 N. Y. 406, 60 N. E. 20, reversing 40 App. Div. 574, 58 N. Y. S. 45; *Hersee v. Simpson*, (1897) 154 N. Y. 496, 48 N. E. 890, affirming 20 App. Div. 100, 46 N. Y. S. 755; *McGillis v. McGillis*, (1898) 154 N. Y. 532, 49 N. E. 145, modifying 11 App. Div. 359, 42 N. Y. S. 921; *Nelson v. Russell*, (1892) 135 N. Y. 137, 31 N. E. 1008, reversing 61 Hun 528, 16 N. Y. S. 395; *Bushnell v. Carpenter*, (1883) 92 N. Y. 270, affirming 28 Hun 19; *Livingston v. Greene*, (1873) 52 N. Y. 118, affirming 6 Laus. 50; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Schwartz v. Rehfuess*, (1908) 129 App. Div. 630, 114 N. Y. S. 92, affirmed without opinion (1910) 198 N. Y. 585, 92 N. E. 1101; *Trowbridge v. Coss*, (1908) 126 App. Div. 679, 110 N. Y. S. 1108, affirmed without opinion (1909) 195 N. Y. 596, 89 N. E. 1114; *Davidson v. Jones*, (1906) 112 App. Div. 254, 98 N. Y. S. 265; *Ackerman v. Ackerman*, (1901) 63 App. Div. 370, 71 N. Y. S. 780; *Bunyan v. Pearson*, (1896) 8 App. Div. 84, 40 N. Y. S. 429; *Matter of McClyment*, (1885) 16 Abb. N. Cas. 262; *Matter of Sutherland*, (1888) 14 N. Y. St. Rep. 84; *Moore v. Lyons*, (1840) 25 Wend. 119; *Matter of Gurnee*, (1914) 84 Misc. 324, 147 N. Y. S. 396. And the words "from and after," in a testamentary gift of a remainder, following a life estate, have been held not to make the remainder contingent and prevent its being construed as vested, where there is nothing else on the face of the will tending to show that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator. *Hersee v. Simpson*, (1897) 154 N. Y. 496, 48 N. E. 890, affirming 20 App. Div. 100, 46 N. Y. S. 755. See also *Ackerman v. Gorton*, (1876) 67 N. Y. 63, reversing 6 Hun 301.

Effect of term "or to their heirs."—Where a testator devised his property to his wife for life with a remainder to his two children "or to their heirs," it was held that the words quoted were to be construed with reference to the testator's death, and the remainders were vested. *Eyclesheimer v. Hunter*, (1914) 162 App. Div. 613, 147 N. Y. S. 958. A conveyance to one "to have and to hold for and during her natural life, and at her death to the heir or heirs of her body her surviving," has been held to create a contingent remainder. *Hall v. La France Fire Engine Co.*, (1899) 158 N. Y. 570, 53 N. E. 513, affirming 8 App. Div. 616, 40 N. Y. S. 1143. But where a remainder is created by words of present gift and the only contingency is a death certain to occur and the remaindermen are known and fixed, the postponing clause is to be regarded as relating only to the period of actual enjoyment and not to the period of the vesting of the interest. *Matter of Gurnee*, (1914) 84 Misc. 324, 147 N. Y. S. 396.

Presumption as to survivorship.—One who claims through a survivorship must prove his survivorship; and there is no presumption in law of survivorship in case of persons who perish in a common disaster. *Newell v. Nichols*, (1878) 75 N. Y. 78, 31 Am. Rep. 424, affirming 12 Hun 604. See *supra*, § 34, note.

Right of holder of vested remainder to bring partition.—It has been held that the holder of a vested remainder could, under certain conditions, maintain an action for partition. *Levy v. Levy*, (1894) 79 Hun 290, 29 N. Y. S. 384, 60 N. Y. St. Rep. 561.

Contingent devise to a class.—The general rule is that a future and contingent devise or bequest to a class takes effect on the happening of the contingency on which the limitation depends only in favor of those objects who at that time come within the description. Thus where a will stated that,

in a certain contingency the residuary estate should, on the death of the testator's wife, "descend to my sisters and their heirs and assigns, and to the children of my deceased brother, and their heirs and assigns. The children of any of my sisters or of my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife," and a sister of the testator had died before the making of the will, it was held that a child of such deceased sister was not included in the devise, and, hence, was not entitled to share in the residuary estate. *Matter of Allen*, (1896) 151 N. Y. 243, 45 N. E. 554, affirming 81 Hun 91, 30 N. Y. S. 683. See also *Campbell v. Stokes*, (1894) 142 N. Y. 23, 36 N. E. 811, affirming 66 Hun 381, 21 N. Y. S. 493; *Goebel v. Wolf*, (1889) 113 N. Y. 405, 21 N. E. 388, 10 A. S. R. 464; *Campbell v. Rawdon*, (1858) 18 N. Y. 412, reversing 19 Barb. 494. So where the gift is of money and the direction to convert the estate is absolute, the legacy given to a class of persons vests in those who answer the description and are capable of taking at the time of the distribution. *Matter of Crane*, (1900) 164 N. Y. 71, 58 N. E. 47, reversing 36 App. Div. 468, 55 N. Y. S. 822. See also *Vanderpoel v. Loew*, (1889) 112 N. Y. 167, 19 N. E. 481; *Smith v. Edwards*, (1882) 88 N. Y. 92, affirming 23 Hun 223; *Teed v. Morton*, (1875) 60 N. Y. 502; *Beatty v. Godwin*, (1908) 127 App. Div. 98, 111 N. Y. S. 373, reversed on other grounds (1910) 198 N. Y. 35. Where it is plain that the testator intended successive gifts to persons named by him, or ascertainable at the time of his death, the last gift is just as direct as the first. In determining whether the future gift to a class is postponed to let in the intermediate estate, or in order ultimately to bestow the corpus or remainder upon persons who shall then be living to enjoy it but who cannot be ascertained at the testator's death, the testator's intention is as decisive as it is in other questions of construction. If the postponement is simply for the benefit or convenience of the estate, that indicates that the gift itself is not intended to be postponed, but that it is not presently payable, and it will be more convenient to pay it after an intermediate or trust estate has expired. But if it is postponed for the benefit of a legatee, as where he is an infant and payment is to be made to him at his majority, then the gift is future and conditional. *Dougherty v. Thompson*, (1901) 167 N. Y. 472, 60 N. E. 760, affirming 54 App. Div. 456, 67 N. Y. S. 200. See also *Matter of Crane*, (1900) 164 N. Y. 71, 58 N. E. 47, reversing 36 App. Div. 468, 55 N. Y. S. 822; *Robert v. Corning*, (1882) 89 N. Y. 225, affirming 23 Hun 299; *Sweet v. Chase*, (1848) 2 N. Y. 73. But when there is a devise to a class to take effect in possession subsequent to a particular estate, those persons are entitled to participate in the devise who were members thereof at the time when the precedent estate terminates. *Overton v. Wilson*, (1913) 156 App. Div. 22, 141 N. Y. S. 130, affirmed (1913) 209 N. Y. 573 mem. See also *Rasquin v. Hamersley*, (1912) 152 App. Div. 522, 137 N. Y. S. 578, affirmed (1913) 208 N. Y. 630 mem.

Limitation to take effect at expiration of void trust.—The authorities are all to the effect that a vested gift, otherwise valid, will not fail merely because it is limited to take effect at the expiration of a trust which is void under the statute of perpetuities. *Matter of Berry*, (1913) 154 App. Div. 509, 139 N. Y. S. 186, affirmed (1913) 209 N. Y. 540 mem. See also *Hawley v. James*, (1836) 16 Wend. 61, reversing 5 Paige 317. And it is no objection to the validity of a remainder in fee that it is limited in favor of persons not in being when the limitation is created, or who are not ascertainable until the termination of the precedent estate, provided the contingency upon which it depends must happen within or not beyond the prescribed period for the vesting of estates. *Purdy v. Burt*, (1883) 92 N. Y. 416.

Limitation of estate in fee by subsequent clause.—It has been uniformly held that an estate in fee, created by will, cannot be cut down or limited by a subsequent clause, unless such clause is as clear and decisive as the language of the clause devising the estate. *Byrnes v. Stilwell*, (1886) 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 769, modifying 38 Hun 523; *Smith v. Scholtz*, (1877) 68 N. Y. 41.

Vesting of contingent interest in trustee in bankruptcy.—Future contingent interests in personal property are alienable, the same as contingent remainders in real property, and such an interest passes to a trustee in bankruptcy. *Clove v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47

L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105. But see also *In re Wetmore*, (1901) 108 Fed. 520, 47 C. C. A. 477.

Unexecuted power of appointment.—An estate and remainder limited to take effect upon default in the exercise of a power of appointment is not prevented from vesting by the existence of the power, but takes effect as if no power existed, subject, however, to be divested by an exercise of the power. *Crackanthorpe v. Sickles*, (1913) 156 App. Div. 753, 141 N. Y. S. 370; *Connolly v. Connolly*, (1907) 122 App. Div. 492, 107 N. Y. S. 185; *Matter of Haggerty*, (1908) 128 App. Div. 479, 112 N. Y. S. 1017, affirmed without opinion (1909) 194 N. Y. 550, 87 N. E. 1120.

Alternative estates.—A fee may be limited on a fee upon a contingency which, if it should occur, must happen within the limits of the prescribed period. Alternative estates, where upon the failure of one to vest the next in succession shall vest, are expressly recognized. *Hennessy v. Patterson*, (1881) 85 N. Y. 91.

Cross-remainders.—It has been held that there is no objection to a limitation to two as tenants in common for life, and of the share of the one first dying to the survivor for life. The raising of cross-remainders by implication is not unusual, and where such an implication is justified by the testator's language, and will accomplish his purpose, it is the duty of the court so to construe the will as to give effect both to the statute and to his intention. *Purdy v. Hayt*, (1883) 92 N. Y. 446. Where, after a devise or bequest in language denoting an absolute gift of the whole estate in fee, there was in a subsequent part of the same will a limitation over in the event of the first devisee dying under age and without issue, it was held that the gifts were not repugnant to each other, but the latter was a valid executory gift. *Norris v. Beyca*, (1855) 13 N. Y. 273. A remainder in fee over to the children, or to the issue of deceased children, of the grantor, was held to have been contingent, so that no interest in the property passed by the will of a child who died before the termination of the precedent estate, where the grant provided that in default of issue of the grantor living at the termination of the precedent estate the property should go to his heirs at law. *Paget v. Melcher*, (1898) 156 N. Y. 399, 51 N. E. 24, reversing 26 App. Div. 12, 49 N. Y. S. 922. In *Monarque v. Monarque*, (1880) 80 N. Y. 320, reversing 19 Hun 332, a life estate was first given to the widow, and by the second clause of the will the testator gave the income arising after her decease to his four daughters during their respective lives, and the remainder to their respective children and their heirs. It was held that the remainder given by the second clause vested upon the death of the testator in the children of the testator's daughters living at that time, subject, however, to open and let in after-born children who might come into existence during the life of the mother. See to the same effect *Surdam v. Cornell*, (1889) 116 N. Y. 305, 22 N. E. 450; *House v. Jackson*, (1872) 50 N. Y. 161; *Moore v. Littel*, (1869) 41 N. Y. 66. Where the testator's will devised his real estate to his wife for life if she remained unmarried, and upon her decease or marriage to C., but in case of the death of the latter without children the remainder to go to A., it was held, that upon the testator's death C. took a vested remainder in fee, subject to be defeated by his death without children, upon which event the substituted remainder, given on that contingency to A., would vest in possession. *Avery v. Everett*, (1888) 110 N. Y. 317, 18 N. E. 148, 6 A. S. R. 368, 1 L. R. A. 264, affirming 36 Hun 6.

Posthumous children.—Posthumous children are placed upon the same footing, with respect to property devised, and property coming by descent, as other children by the same parent; and this is upon the principle that a child en ventre sa mere shall be considered in esse for most purposes of property (see *infra*, § 56). *Mason v. Jones*, (1848) 2 Barb. 229.

Cited.—This section was cited in *Matter of Easterly*, (1911) 202 N. Y. 466, 96 N. E. 122, reversing *Matter of Lamoree*, (1910) 140 App. Div. 650, 125 N. Y. S. 1005; *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21; *Powers v. Bergen*, (1852) 6 N. Y. 358; *Pattison v. Cusack*, (1911) 147 App. Div. 428, 131 N. Y. S. 795; *Lewis v. Howe*, (1901) 64 App. Div. 572, 72 N. Y. S. 851, affirmed (1903) 174 N. Y. 340, 66 N. E. 975, 1101; *Levy v. Levy*, (1894) 79 Hun 290, 31 Abb. N. Cas. 468, 29 N. Y. S. 384; *Baldwin v. Baldwin*, (1893) 74 Hun 415, 26 N. Y. S. 579, 23 Civ. Pro. 268; *Pickert v. Windecker*, (1893) 73 Hun 476, 26 N. Y. S. 437, 56 N. Y. St. Rep. 12;

Palmer v. Dunham, (1889) 52 Hun 468, 6 N. Y. S. 46, affirmed (1890) 125 N. Y. 68, 25 N. E. 1081, 34 N. Y. St. Rep. 408; *Matter of Chapman*, (1908) 61 Misc. 593, 115 N. Y. S. 981, affirmed 133 App. Div. 337, 117 N. Y. S. 679; *Craver v. Jermain*, (1896) 17 Misc. 244, 40 N. Y. S. 1056; *Balen v. Youmans*, (1892) 20 N. Y. S. 657; *Billings v. Baker*, (1859) 28 Barb. 343; *Eells v. Lynch*, (1861) 8 Bosw. 465.

§ 41. Power of appointment not to prevent vesting. The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

This section was derived from Real Property Law of 1896, § 31.

Section 41 of the Real Property Law of 1896 is now covered by section 51.

Powers generally: see *infra*, § 130 et seq.

When grant takes effect: see *infra*, § 244.

Section as declaratory of common law.—This section is a statement of the common law as it existed prior to the enactment. *Matter of Haggerty*, (1908) 128 App. Div. 479, 112 N. Y. S. 1017, affirmed without opinion (1909) 194 N. Y. 550, 87 N. E. 1120; *Root v. Stuyvesant*, (1837) 18 Wend. 257. The statute concerning powers did not formerly recognize the existence of powers of appointment. As a term of description, "powers of appointment" continued in use after the abolition of all common law powers by the Revised Statutes, and they now again have an official recognition, although the classification is inconsistent with the Revised Statutes. *Matter of Mays*, (1912) 76 Misc. 416, 136 N. Y. S. 1066. See also *Lockwood v. Mildeberger*, (1899) 159 N. Y. 181, 53 N. E. 803; *Fargo v. Squires*, (1897) 154 N. Y. 250, 48 N. E. 509; *Matter of Piffard*, (1888) 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193; *In re New York Life Ins., etc., Co.*, (1913) 139 N. Y. S. 695. And the rule of the common law that where a person had a general power of appointment by will over property, and had exercised the power, the property formed a part of his assets and was subject to the claims of creditors, and that too in preference to those of a legatee, or of the gratuitous appointee, was abrogated by the provision of the Revised Statutes (1 R. S. 732, § 73) abolishing powers as then existing by law, and declaring that their creation should be thereafter governed by the provisions of the article "of powers." It was the legislative intent to make that article a complete and exclusive code on the subject. *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360. See also *Jennings v. Conboy*, (1878) 73 N. Y. 230, reversing 10 Hun 77.

Effect of unexecuted power on remainder.—It is a well-established rule, both of the common law and by statute in this state that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power. *Crackanthorpe v. Sickles*, (1913) 156 App. Div. 753, 141 N. Y. S. 370; *Connolly v. Connolly*, (1907) 122 App. Div. 492, 107 N. Y. S. 185. See also *Matter of Haggerty*, (1908) 128 App. Div. 479, 112 N. Y. S. 1017, affirmed without opinion (1909) 194 N. Y. 550, 87 N. E. 1120; *Cruikshank v. Cruikshank*, (1902) 39 Misc. 401, 80 N. Y. S. 8. But this rule does not apply where no estate whatever, either vested or contingent, is given in remainder. *Doctor v. Hughes*, (1916) 161 N. Y. S. 634.

Power of sale as vesting title.—The presence in a will of an imperative power of sale given to executors to be exercised at a future time, does not necessarily prevent a vesting, especially when it is apparent from other provisions of the will that it was intended that the estate should vest presently. An estate may vest subject to the execution of the power, which may be for the purpose of distribution only, the effect of which would be to transfer the title in the realty to the proceeds. *Matter of Brown*, (1897) 154 N. Y. 313, 48 N. E. 537, affirming *Matter of Merriman*, (1895) 91 Hun 120, 36 N. Y. S. 131. See also *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21.

Cited.—This section was cited in *Matter of Chapman*, (1908) 61 Misc. 593, 115 N. Y. S. 981, affirmed 133 App. Div. 337, 117 N. Y. S. 679; *Hayden v. Sugden*, (1905) 48 Misc. 108, 96 N. Y. S. 681.

§ 42. Suspension of power of alienation. The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority.

This section was derived from Real Property Law of 1896, § 32. The report of the Board of Statutory Consolidation (1907), pages 4896, 4897, has the following notes relating to this section: "The authors of the General Laws unfortunately changed the Revised Statutes. By their transpositions and omission of the provisions of the statutes *future estates* only were made void when in conflict with the rule. A trust estate, in the case of an executed trust, is always a *present* estate, and not a *future estate*, and although it may offend against the spirit of the rule against perpetuities there is no provision now on the statute books avoiding it. Subdivision 2 (old 1 R. S. 723, § 15) controlled it formerly. But the revisers of the General Laws, in their revision of the statutes, failed to incorporate this subdivision. The profession has been anxiously expecting some case which would involve this omission. The courts would possibly rectify it by a violent assumption, deciding that no change in the Revised Statutes was intended."

"The rule against perpetuities, expressed in this section has been lately held, since L. 1903, ch. 701, to have no further application to charitable uses: *Allen v. Stevens*, 161 N. Y. 122; *Matter of Griffin*, 167 N. Y. 71, 81. This being so, it should be so plainly stated in a statute consolidating the laws relating to charities. At common law, charitable, or public, uses were not subject to the rule against perpetuities, except as to the time of vesting in possession, which could not be postponed beyond the legal limit. *Marsden on Perpetuities*, 24, 295; *Challis on Real Property*, 157. This was a wise exception recognized in this state, and it should be continued. *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108. The phrase 'except as to the time of vesting in possession' is the technical one employed, in the law relating to charitable uses, to express that such uses must vest within the time limit prescribed by the rule against perpetuities."

Section 42 of the Real Property Law of 1896 is now covered by section 52.

Suspension of power of alienation as to chattels real: see *infra*, § 49.

Suspension of power of alienation in consequence of valid limitation of expectant estate: see *infra*, § 63.

Computation of term of suspension by instrument in execution of a power: see *infra*, § 178.

Suspension of ownership of personal property: see PERSONAL PROPERTY LAW, § 11.

When income of trust fund is not alienable: see PERSONAL PROPERTY LAW, § 15.

Validity of provision in deed that the grantee shall not sell in the lifetime of the grantor: see L. R. A. 1916D 930 note.

Attempt to create active trust to continue beyond period limited by rule against perpetuities: see L. R. A. 1917C 937 note.

Validity of partial or limited restraint on alienation of fee simple estate: see 7 Ann. Cas. 319 note.

Effect of perpetuity upon contemporaneous or prior interests: see 5 Ann. Cas. 431 note.

Effect of doctrine as to possibility of issue extinct in determining whether rule against perpetuities has been violated: see 48 L. R. A. (N. S.) 867 note.

Effect of devise of unconditional estate subject to payment of certain legacy within stated time to suspend the power of alienation: see L. R. A. 1917A 611 note.

Gift in violation of mortmain statute as void or voidable: see 10 Ann. Cas. 1030 note.

Trust of indefinite duration for maintenance, repair, etc., of residence or homestead as offending rule against perpetuities: see Ann. Cas. 1914B 551 note.

Option to purchase realty as violating rule against perpetuities: see Ann. Cas. 1916D 577.

Request for support or establishment of free or public schools as violation of rule against perpetuities: see 8 Ann. Cas. 928 note.

Validity, within rule against perpetuities, of gift to charity not in existence and beginning of whose existence is uncertain or contingent: see Ann. Cas. 1913A 139 note.

Validity of reservation of mineral rights in perpetuity: see Ann. Cas. 1912D 886 note.

Effect of adverse possession by trustees to bar recovery of trust property on ground that trust violated rule against perpetuities: see L. R. A. 1917C 937 note.

Common law rule of suspension.—By the common law the absolute ownership of real property could be suspended during the continuance of a life or any number of lives in being at the creation of the estate, and of twenty-one years after, and nine months in addition, for the birth of a posthumous child. *Stewart v. McMartin*, (1849) 5 Barb. 438; *Wilkes v. Lion*, (1823) 2 Cow. 333; *Jackson v. Brown*, (1835) 13 Wend. 437.

Principles in determining validity of wills.—Two elementary principles in determining the validity of wills are: First, such validity must be determined not in the light of what has actually transpired, but from exactly the same point of view from which it would be regarded had a suit been brought to determine the validity of the will at the time of the death of the testator, instead of at a subsequent period. The validity of a will depends not on what has happened since the death of the testator, but on what might have happened. Second, in determining the validity of limitations of estates in reference to absolute ownership and restraint of alienation, it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. To render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estates will be held void. *Matter of Wilcox*, (1909) 194 N. Y. 288, 87 N. E. 497, reversing 125 App. Div. 152, 109 N. Y. S. 564. See also *Monypeny v. Monypeny*, (1911) 202 N. Y. 90, 95 N. E. 1, reversing 136 App. Div. 677, 121 N. Y. S. 590; *Roe v. Vingut*, (1889) 117 N. Y. 204, 22 N. E. 933; *Henderson v. Henderson*, (1889) 113 N. Y. 1, 20 N. E. 814, reversing 46 Hun 509, 12 N. Y. St. Rep. 577; *Delafield v. Shipman*, (1886) 103 N. Y. 463, 9 N. E. 184, reversing 34 Hun 514; *Kahn v. Tierney*, (1909) 135 App. Div. 897, 120 N. Y. S. 663, affirmed without opinion (1911) 201 N. Y. 516, 94 N. E. 1095; *Holden v. Rush*, (1907) 119 App. Div. 716, 104 N. Y. S. 175; *Matter of Raab*, (1913) 79 Misc. 185, 139 N. Y. S. 869; *Case v. Case*, (1896) 16 Misc. 393, 39 N. Y. S. 530; *Brandt v. Brandt*, (1895) 13 Misc. 431, 34 N. Y. S. 684; *Killam v. Allen*, (1868) 52 Barb. 605; *Irvine v. De Kay*, (1842) 97 Paige 521. And the rule is now firmly established in this state, that when the several parts of a will are so intermingled or interdependent that the had cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be, and in order to avoid the suspension of the power of alienation. *Smith v. Chesbrough*, (1903) 176 N. Y. 317, 68 N. E. 625, reversing 82 App. Div. 578, 81 N. Y. S. 570; *Kalish v. Kalish*, (1901) 166 N. Y. 368, 59 N. E. 917, affirming 45 App. Div. 528, 61 N. Y. S. 148. See also *Haug v. Schumacher*, (1901) 166 N. Y. 506, 60 N. E. 245, modifying 50 App. Div. 562, 64 N. Y. S. 310; *Lee v. Tower*,

(1891) 124 N. Y. 370, 26 N. E. 943; *Post v. Hover*, (1865) 33 N. Y. 593, affirming 30 Barb. 312; *Megatt v. Maslen*, (1910) 141 App. Div. 468, 126 N. Y. S. 405; *Davidge v. Wiggins*, (1912) 137 N. Y. S. 127; *Matter of Lang*, (1911) 72 Misc. 589, 131 N. Y. S. 991; *Brady v. Hanson*, (1910) 68 Misc. 198, 123 N. Y. S. 645; *Matter of Hoffman*, (1909) 65 Misc. 126, 121 N. Y. S. 100, affirmed 130 App. Div. 121; *Simpson v. Trust Co. of America*, (1908) 59 Misc. 96, 112 N. Y. S. 155, affirmed 129 App. Div. 209, affirmed (1910) 197 N. Y. 586; *Coon v. Coon*, (1902) 38 Misc. 693, 78 N. Y. S. 245. But it is to be presumed that a testator intended to make a legal disposition of his estate, and not a void or illegal one. So it is the duty of the court to give to the language used such construction as will make the instrument or limitation legal and valid, if it can be done in harmony with well-settled rules, with the manifest intent, and in undoubted cases, rather than such construction as will render them illegal and nugatory. *Du Bois v. Ray*, (1866) 35 N. Y. 162, reversing 7 Bosw. 244. See also *Jacoby v. Jacoby*, (1907) 188 N. Y. 124, 80 N. E. 676, affirming 113 App. Div. 913, 160 N. Y. S. 1122; *Mee v. Gordon*, (1907) 187 N. Y. 400, 80 N. E. 253, 116 A. S. R. 613, 19 Ann. Cas. 172, reversing 104 App. Div. 529, 93 N. Y. S. 675; *Hopkins v. Kent*, (1895) 145 N. Y. 363, 40 N. E. 4.

How absolute ownership is suspended.—It is now the settled law in this state that absolute ownership is suspended in only one of two ways: (1) By the creation of a trust which vests the estate in trustees. (2) By the creation of future estates, vesting upon the occurrence of some future and contingent event. *Wilber v. Wilber*, (1901) 165 N. Y. 451, 59 N. E. 264, affirming 45 App. Div. 158, 60 N. Y. S. 1964; *Steinway v. Steinway*, (1900) 163 N. Y. 183, 57 N. E. 312, affirming 24 App. Div. 104, 48 N. Y. S. 1046; *Smith v. Edwards*, (1882) 88 N. Y. 92, affirming 23 Hun 223; *Everitt v. Everitt*, (1864) 29 N. Y. 39; *Leonard v. Burr*, (1858) 18 N. Y. 96; *Matter of Roberts*, (1906) 112 App. Div. 732, 98 N. Y. S. 809; *Matter of Conger*, (1903) 81 App. Div. 493, 80 N. Y. S. 933; *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879.

Test of alienability.—“The test of alienability of real or personal property is that there are persons in being who can give a perfect title. Where there are living parties who have unitedly the entire right of ownership, the statute has no application. The ownership is absolute whether the power to sell resides in one individual or in several. If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation. The ownership, although divided, continues absolute.” *Williams v. Montgomery*, (1896) 148 N. Y. 519, 43 N. E. 57, modifying 68 Hun 416, 22 N. Y. S. 1033. To the same effect see *Sawyer v. Cubby*, (1895) 146 N. Y. 192, 40 N. E. 869, reversing 73 Hun 298, 26 N. Y. S. 426; *Murphy v. Whitney*, (1894) 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123, affirming 69 Hun 573, 23 N. Y. S. 1134; *Buschmann v. McDermott*, (1913) 154 App. Div. 515, 139 N. Y. S. 311; *Matter of Bray*, (1907) 118 App. Div. 533, 102 N. Y. S. 989; *Thieler v. Rayner*, (1906) 115 App. Div. 626, 100 N. Y. S. 993, affirmed without opinion (1907) 190 N. Y. 546, 83 N. E. 1133; *Matter of Roberts*, (1906) 112 App. Div. 732, 98 N. Y. S. 809; *Russell v. Hilton*, (1903) 80 App. Div. 178, 80 N. Y. S. 563, affirmed without opinion (1903) 175 N. Y. 525, 67 N. E. 1089; *Smith v. A. D. Farmer Type Founding Co.*, (1897) 16 App. Div. 438, 45 N. Y. S. 192; *Durkee v. Smith*, (1915) 90 Misc. 292, 153 N. Y. S. 316; *Vandenburgh v. Vandenburgh*, (1914) 85 Misc. 131, 147 N. Y. S. 244; *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58; *Matter of Gulick*, (1916) 96 Misc. 110, 160 N. Y. S. 525; *Whitefield v. Crissman*, (1907) 55 Misc. 468, 106 N. Y. S. 630, affirmed 123 App. Div. 233, 108 N. Y. S. 110; *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879; *Bowers v. Beckman*, (1878) 16 Hun 268; *Butkley v. Depeyster*, (1841) 26 Wend. 21; *Murray v. Murray*, (1887) 7 N. Y. St. Rep. 391; *Odell v. Youngs*, (1882) 64 How. Pr. 56; *Morris v. Porter*, (1876) 52 How. Pr. 1. But where there are no persons in being by whom an absolute fee in possession can be conveyed, and the future estate suspends the absolute power of alienation for a longer period than during two lives in being, the limitation is void. *Benedict v. Levi*, (1917) 163 N. Y. S. 846.

Having determined in a given case that there is a suspension of the power of alienation, or of absolute ownership, it then becomes important to inquire whether, under the terms of the instrument creating the estates, the suspen-

sion is an unlawful one, because the statute expressly recognizes the right of such suspension for and during the period of the existence of two lives in being at the time of the creation of the estate. But in applying the test it must always be kept in mind that where, by the terms of an instrument creating an estate there may be an unlawful suspension of the power of alienation or of the absolute ownership, the limitation is void although it should by subsequent events turn out that no actual suspension beyond the prescribed period would have taken place. "In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator or the estate will be held void." *Herzog v. Title Guarantee, etc., Co.*, (1903) 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146, reversing 85 App. Div. 549, 83 N. Y. S. 548. See also *Morton Trust Co. v. Sands*, (1909) 195 N. Y. 28, 87 N. E. 783, reversing 122 App. Div. 691, 107 N. Y. S. 698; *Fowler v. Ingersoll*, (1891) 127 N. Y. 472, 28 N. E. 471; *Underwood v. Curtis*, (1891) 127 N. Y. 523, 28 N. E. 585; *Lee v. Tower*, (1891) 124 N. Y. 370, 26 N. E. 943; *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21; *Haynes v. Sherman*, (1889) 117 N. Y. 433, 22 N. E. 938, reversing 51 Hun 585, 4 N. Y. S. 413; *Genet v. Hunt*, (1889) 113 N. Y. 158, 21 N. E. 91; *Ward v. Ward*, (1887) 105 N. Y. 68, 11 N. E. 373; *Van Cott v. Prentice*, (1887) 104 N. Y. 45, 10 N. E. 257, affirming 35 Hun 317; *Radley v. Kuhn*, (1884) 97 N. Y. 26, modifying and affirming 28 Hun 573; *Crooke v. Kings County*, (1884) 97 N. Y. 421; *Bailey v. Bailey*, (1884) 97 N. Y. 460; *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201, modifying and affirming 30 Hun 605; *Purdy v. Hayt*, (1883) 92 N. Y. 446; *Mott v. Ackerman*, (1883) 92 N. Y. 539; *Colton v. Fox*, (1876) 67 N. Y. 348, affirming 6 Hun 49; *Knox v. Jones*, (1872) 47 N. Y. 389; *Schettler v. Smith*, (1869) 41 N. Y. 328; *Davis v. MacMahon*, (1914) 161 App. Div. 458, 146 N. Y. S. 657, affirmed (1914) 214 N. Y. 614 mem.; *La Farge v. Brown*, (1898) 31 App. Div. 542, 52 N. Y. S. 93; *Matter of Turner*, (1913) 82 Misc. 25, 143 N. Y. S. 692; *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879; *Walsh v. Waldron*, (1892) 63 Hun 315, 17 N. Y. S. 829, affirmed without opinion (1892) 135 N. Y. 650, 32 N. E. 647; *Gage v. Gage*, (1887) 43 Hun 501, affirmed without opinion (1889) 112 N. Y. 667, 20 N. E. 414; *In re Marcial*, (1891) 15 N. Y. S. 89, 37 N. Y. St. Rep. 569; *Fowler v. Depau*, (1857) 26 Barb. 224; *Morton v. Morton*, (1850) 8 Barb. 18; *Hones v. Van Schaick*, (1838) 20 Wend. 564; *Root v. Stuyvesant*, (1837) 18 Wend. 257; *Hawley v. James*, (1836) 16 Wend. 61; *Simpson v. English*, (1873) 4 Thomp. & C. 80.

Suspension for fixed term.—Where a will directs that property be held in trust for a term of years, such trust is void, as a trust which is to continue for a definite number of years, during which the power of alienation is suspended may readily be for a longer period than two lives in being. *Kalish v. Kalish*, (1901) 166 N. Y. 368, 59 N. E. 917, affirming 45 App. Div. 528, 61 N. Y. S. 448; *Keenan v. Keenan*, (1907) 122 App. Div. 435, 107 N. Y. S. 152; *Stewart v. Woolley*, (1907) 121 App. Div. 531, 106 N. Y. S. 99. See also *Hillyer v. Vandewater*, (1890) 121 N. Y. 681 mem., 24 N. E. 999, 31 N. Y. St. Rep. 671; *Dexter v. Watson*, (1907) 54 Misc. 484, 106 N. Y. S. 80; *McGuire v. McGuire*, (1902) 80 App. Div. 63, 80 N. Y. S. 497. So, where the whole scheme of distribution created an absolute trust period, not measured by any life or two lives in being at the time of the testator's death, it was held that the trust was invalid. *Matter of Hitchcock*, (1916) 176 App. Div. 326, 160 N. Y. S. 1029; *Smith v. Smith*, (1912) 154 App. Div. 313, 139 N. Y. S. 124; *Trowbridge v. Metcalf*, (1896) 5 App. Div. 318, 39 N. Y. S. 241, affirmed without opinion (1899) 158 N. Y. 682, 52 N. E. 1126; *Bean v. Bowen*, (1874) 47 How. Pr. 306. See also *Rice v. Barrett*, (1886) 102 N. Y. 161, 6 N. E. 898. But a limitation of a trust estate for an arbitrary period of time, such as fifty years, is valid, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust. The statute is satisfied by the absolute necessity for the termination of the trust at the expiration of the two lives, and what may be done with the income in the meantime is, so far as this question is concerned, wholly immaterial. *Schermerhorn v. Cotting*, (1892) 131 N. Y. 48, 29 N. E. 980. See also *Montignani v. Blade*, (1895) 145 N. Y. 111, 39 N. E. 719, modifying 74 Hun 297, 23 N. Y. S. 670; *Locke v. Farmers' Loan, etc., Co.*, (1892) 140 N. Y. 135, 35 N. E. 578, reversing 66 Hun 428, 21 N. Y. S. 524; *Cochrane v. Schell*, (1894) 140 N. Y. 516, 35 N. E. 971, affirming 64 Hun 576, 19 N. Y. S. 424.

Savage v. Burnham, (1858) 17 N. Y. 561; *Anthony v. Van Valkenburgh*, (1912) 154 App. Div. 380, 139 N. Y. S. 599; *Kahn v. Tierney*, (1909) 135 App. Div. 897, 120 N. Y. S. 663, affirmed without opinion (1911) 201 N. Y. 516, 94 N. E. 1095; *Matter of Charlier*, (1897) 22 App. Div. 71, 47 N. Y. S. 818; *Matthews v. Studley*, (1897) 17 App. Div. 303, 45 N. Y. S. 201, affirmed without opinion (1900) 161 N. Y. 633, 57 N. E. 1117; *Walker v. Taylor*, (1897) 15 App. Div. 452, 44 N. Y. S. 446. So a deed placing lands in trust until such time as the survivor of two beneficiaries in being at the time of the creation of the trust shall die, was held not to violate the statute against perpetuities, even though it provided that at the termination of the trust the lands should be divided among the heirs of three beneficiaries named. *Ogilby v. Hickok*, (1911) 144 App. Div. 61, 128 N. Y. S. 860, affirmed without opinion (1911) 202 N. Y. 614, 96 N. E. 1123. See also *Brevoort v. Townsend*, (1915) 91 Misc. 143, 154 N. Y. S. 1031. Thus, in all the adjudicated cases the "courts have uniformly held that the period of suspension of alienation could not be measured by time alone; that life must in some form be the measure of the period of suspension." *Moore v. Moore*, (1866) 47 Barb. 257; *King v. Rudle*, (1853) 15 Barb. 139; *Yates v. Yates*, (1850) 9 Barb. 324; *Hawley v. James*, (1836) 16 Wend. 61; *Coster v. Lorillard*, (1835) 14 Wend. 265; *Kiah v. Grenier*, (1873) 1 Thomp. & C. 388, affirmed (1874) 56 N. Y. 220. And a suspension for any definite period, however short, is illegal and invalid. *Washburn v. Acorne*, (1911) 74 Misc. 301, 131 N. Y. S. 963, affirmed without opinion 151 App. Div. 948, 136 N. Y. S. 1150.

Limitation upon person's attaining given age.—Where the trust is limited upon a certain person's attaining a given age, it is to be construed as if it provided that the trust is to continue until the person upon whose life it is limited attains the given age or sooner dies. *Appell v. Appell*, (1917) 164 N. Y. S. 246.

The suspension of the absolute power of alienation of real estate may be extended beyond two lives, so as to embrace the period of minority of a child to whom the remainder is limited, and such suspension may be created by a contingent limitation of the fee. *Schlereth v. Schlereth*, (1903) 173 N. Y. 444, 66 N. E. 130, 93 A. S. R. 616, affirming 73 App. Div. 283, 76 N. Y. S. 676.

In *Coston v. Coston*, (1907) 118 App. Div. 1, 103 N. Y. S. 307, the trust was to continue "until the youngest of said children shall attain the age of thirty-five years," and the court held that the trust was valid, being limited upon the coming to the age of thirty-five years or earlier dying of the youngest of the children living at the death of the testatrix. See also *Matter of Lally*, (1910) 136 App. Div. 781, 121 N. Y. S. 467, affirmed without opinion (1910) 198 N. Y. 608 mem., 92 N. E. 1039; *Burke v. O'Brien*, (1906) 115 App. Div. 574, 100 N. Y. S. 1048; *Schreiner v. Schreiner*, (1909) 63 Misc. 601, 118 N. Y. S. 608; *Matter of Mikantowie*, (1908) 60 Misc. 273, 113 N. Y. S. 278; *Toher v. Crounse*, (1907) 57 Misc. 252, 107 N. Y. S. 990; *Stehlin v. Stehlin*, (1893) 67 Hun 110, 22 N. Y. S. 40; *Foot v. Bruggerhof*, (1892) 66 Hun 406, 21 N. Y. S. 509; *McGowan v. McGowan*, (1853) 2 Duer 57.

A direction that the testator's property "be equally divided and equally shared" among his wife and children, "after the youngest child of them shall have attained the age of twenty-one years," must be construed as of the time of the testator's death, and so construed it was held as referring to the youngest of his children then living, who was in fact his youngest child, and a suspension of the power of alienation during his minority was therefore valid. *Jacoby v. Jacoby*, (1907) 188 N. Y. 124, 89 N. E. 676, affirming 113 App. Div. 913, 100 N. Y. S. 1122. And where a testator, having several children, left his property in trust "until the youngest surviving child shall have reached the age of 21 years," it was held that the trust was limited upon the majority or earlier death of the youngest child surviving the testator, and not upon the youngest of his children named in the will attaining the age of twenty-one years. *Boeher v. Smada Realty Co.*, (1914) 164 App. Div. 837, 150 N. Y. S. 263.

Suspension during minority and further suspension of same person.—A suspension during the minority of a designated individual and a further suspension during the life of the same person does not in legal effect differ from a single suspension in the first instance during the life of that person. *Benedict v. Webb*, (1885) 98 N. Y. 460; *Rayden v. Sugden*, (1905) 48 Misc. 108, 96 N. Y. S. 681. And a minority constitutes a life. *Oxley v. Lane*, (1866) 35

N. Y. 340; *Savage v. Burnham*, (1858) 17 N. Y. 561; *Hunter v. Hunter*, (1860) 31 Barb. 334; *Taylor v. Gould*, (1851) 10 Barb. 388.

Period measured by existing lives.—The period of suspension must be measured by existing lives, or by some more proximate event, which may happen during life, and the persons whose lives are to furnish the measure of the suspension must be designated or referred to, so as to be capable of ascertainment in the instrument by which the disposition is made. *Everitt v. Everitt*, (1864) 29 N. Y. 39. See also *Underwood v. Curtis*, (1891) 127 N. Y. 523, 28 N. E. 585; *Vanderpoel v. Loew*, (1889) 112 N. Y. 167, 19 N. E. 481; *Schettler v. Smith*, (1869) 41 N. Y. 328; *Wells v. Rowland*, (1913) 155 App. Div. 354, 140 N. Y. S. 341; *Guental v. Guental*, (1906) 113 App. Div. 310, 98 N. Y. S. 1002; *Bindrim v. Ullrich*, (1901) 64 App. Div. 444, 72 N. Y. S. 239; *Staples v. Hawes*, (1898) 24 Misc. 475, 53 N. Y. S. 860, affirmed 39 App. Div. 548, 57 N. Y. S. 452; *Finch v. Wilkes*, (1896) 17 Misc. 428, 41 N. Y. S. 227; *Brandt v. Brandt*, (1895) 13 Misc. 431, 34 N. Y. S. 684; *Sanford v. Goodell*, (1894) 82 Hun 369, 31 N. Y. S. 490; *Cowen v. Rinaldo*, (1894) 82 Hun 479, 31 N. Y. S. 554; *Wells v. Wells*, (1892) 30 Abb. N. Cas. 225, 24 N. Y. S. 874; *Stevenson v. Lesley*, (1875) 49 How. Pr. 229. So, a power to select beneficiaries from all the members of a community, or all corporations of a particular class, wherever they may exist, however numerous, has been held to be void for indefiniteness. *Read v. Williams*, (1891) 125 N. Y. 560, 26 N. E. 730, 21 A. S. R. 748. See also *Fosdick v. Hempstead*, (1891) 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, reargument denied (1891) 126 N. Y. 651, 27 N. E. 382, 37 N. Y. St. Rep. 130.

Limitation in favor of persons not in being.—It is no objection that the remainder was limited in favor of persons not in being when the limitation was created, provided that the contingency upon which the final vesting depends must happen, and the persons entitled to take be ascertained within the permitted period. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282. See also *Purdy v. Hayt*, (1883) 92 N. Y. 446; *Harriot v. Harriot*, (1898) 25 App. Div. 245, 49 N. Y. S. 447. In *Monarque v. Monarque*, (1880) 80 N. Y. 320, reversing 19 Hun 332, a life estate was first given to the widow, and by the second clause of the will the testator gave the income arising after her decease to his four daughters during their respective lives, and the remainder to their respective children, and their heirs. It was held that the remainder given by the second clause vested upon the death of the testator in the children of the testator's daughters living at that time, subject, however, to open and let in after-born children who might come into existence during the life of the mother. See also *Surdam v. Cornell*, (1889) 116 N. Y. 305, 22 N. E. 450; *Wilson v. White*, (1888) 109 N. Y. 59, 15 N. E. 749, 4 A. S. R. 420; *Ward v. Ward*, (1887) 105 N. Y. 68, 11 N. E. 373. Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. *Kent v. Church of St. Michael*, (1892) 136 N. Y. 10, 32 N. E. 704, 32 A. S. R. 693, 18 L. R. A. 331. The power of the legislature by special act to authorize a sale of infants' lands, including the future contingent interests of those not in being, is well established in this state. *Ebling v. Dreyer*, (1896) 149 N. Y. 460, 44 N. E. 155, reversing 79 Hun 319, 29 N. Y. S. 459.

Unlawful suspension by trust.—The power of alienation can no more be suspended beyond the prescribed period by a trust than by a limitation of a strictly legal estate. *Cottman v. Grace*, (1889) 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492. See also *Benedict v. Levi*, (1917) 163 N. Y. S. 846. Nor can a perpetuity be created by means of a power in trust any more than by a direct limitation. *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *Keyser v. Mead*, (1907) 53 Misc. 114, 103 N. Y. S. 1091. And it has been held that estates cannot be tied up during one life by a trust in lands, and then for two lives more as personal property, by means of a direction to convert them into money or personality, and then impressing on them new limitations in that form. *Savage v. Burnham*, (1858) 17 N. Y. 561. See also *Hunter v. Hunter*, (1860) 31 Barb. 334. But a vested gift, otherwise valid, will not fail merely because it is limited to take effect at the expiration of a

trust which is void under the statute. *Matter of Berry*, (1913) 154 App. Div. 509, 139 N. Y. S. 186, affirmed without opinion (1913) 209 N. Y. 540, 102 N. E. 1099. See also *Matter of McQueen*, (1917) 99 Misc. 185, 163 N. Y. S. 287.

Separable trust.—Where the purposes of a trust are separable, and some of them must arise within two lives in being, but others can become operative only after the expiration of such two lives, the former will be sustained and the latter rejected. *Harrison v. Harrison*, (1867) 36 N. Y. 543, affirming 42 Barb. 162; *Post v. Hover*, (1865) 33 N. Y. 593, affirming 30 Barb. 312; *Armory v. Lord*, (1853) 9 N. Y. 403. See also *Matter of Murray*, (1902) 75 App. Div. 246, 78 N. Y. S. 165; *James v. Beasley*, (1878) 14 Hun 520; *Matteson v. Armstrong*, (1877) 11 Hun 245; *De Kay v. Irving*, (1846) 5 Denio 646. An ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate. *Tiers v. Tiers*, (1885) 98 N. Y. 568, affirming 32 Hun 184.

Separate and independent trusts in undivided fund.—Where by a will income and principal are given in equal shares out of one fund kept in solido for mere convenience of investment, separate and independent trusts may be created for the several beneficiaries and the shares and interests will be several even though the fund remains undivided. But where a trust for the benefit of several persons is held in one fund it is necessary for the purpose of holding that they constitute separate and independent trusts that each part of the principal fund should be liberated from the trust fund upon the termination of the lives in being at the death of the testator for which the trust is held, and also to find from within the will itself that such was the intention of the testator. *Leach v. Godwin*, (1910) 198 N. Y. 35, 91 N. E. 288, reversing 127 App. Div. 98, 111 N. Y. S. 373. See also *Savage v. Burnham*, (1858) 17 N. Y. 561; *Pryer v. Pryer*, (1911) 145 App. Div. 928, 126 N. Y. S. 393, 130 N. Y. S. 1126, affirmed (1913) 207 N. Y. 710 mem.; *Matter of Chapman*, (1909) 133 App. Div. 337, 117 N. Y. S. 679, appeal dismissed (1909) 196 N. Y. 561, 90 N. E. 1157; *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58; *Matter of Murray*, (1902) 75 App. Div. 246, 78 N. Y. S. 165; *Bascom v. Weed*, (1907) 53 Misc. 496, 105 N. Y. S. 459; *Hayden v. Sugden*, (1905) 48 Misc. 108, 96 N. Y. S. 681. And it is not necessary that a testator actually sever the trust fund in the case of several trusts carved out of such fund, as it suffices that each trust be made distinct, and each will be considered alone on the question of illegal suspension. *Post v. Bruere*, (1908) 127 App. Div. 250, 111 N. Y. S. 51.

Annuity chargeable upon income.—An annuity to the testator's widow, chargeable upon the income, does not suspend the power of alienation of the residuary estate during the lifetime of the widow, where under the terms of the will if the children of the testator predecease the widow the value of her annuity may be ascertained and paid over and the remainder distributed free from any trust. *Central Trust Co. v. Falck*, (1917) 164 N. Y. S. 473.

Suspension by agreement.—It has been held that the power of alienation cannot be unlawfully suspended by agreement between the parties. *Church v. Wilson*, (1912) 152 App. Div. 844, 137 N. Y. S. 1002, affirmed without opinion (1913) 200 N. Y. 553, 103 N. E. 1122.

Trust limited upon life estate.—A trust for the lives of two sons, created by a testatrix in the remainder of her estate, limited upon a life estate to her husband, with an ultimate remainder to her grandchildren who should be living at the death of both sons, does not unlawfully suspend the power of alienation. *Matter of Hurlbut*, (1906) 51 Misc. 263, 100 N. Y. S. 1098.

Effect of power of sale.—The absolute ownership and power of disposition of a testator's real estate is not suspended because the executor, to whom the will gives an imperative power of sale, may require a period of time not measured by lives to execute the power and convert the real estate into personalty, as such a suspension results only in a case where there are no persons in being by whom an absolute estate in possession may be conveyed. Thus, where the will of a testator who died in 1890, directed his executor to sell certain real estate, during the spring months of 1891, at public auction to the highest bidder and to invest the proceeds for the benefit of certain of the legatees named in the will, and upon settlement of the accounts of the executor it was claimed that said provision violated the statute against perpetuities, as by fixing a time of sale it suspended the power of alienation for a period

not measured by lives, it was held untenable; and that the direction as to time was advisory, intended to facilitate the sale, not to restrain or limit the power of absolute disposition. *Deegan v. Wade*, (1895) 144 N. Y. 573, 39 N. E. 692, affirming 75 Hun 39, 26 N. Y. S. 989; *Chanler v. New York El. R. Co.*, (1898) 34 App. Div. 305, 54 N. Y. S. 341. See also *Robert v. Corning*, (1882) 89 N. Y. 225, affirming 23 Hun 299; *Stewart v. Hamilton*, (1885) 37 Hun 19; *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615. A trust which would be otherwise void as suspending the power of alienation for more than two lives in being, is not made valid because of there being given to the trustees power to sell the trust property, the proceeds of such sale remaining subject to the execution of the trust. *Hobson v. Hale*, (1884) 95 N. Y. 588; *Brewer v. Brewer*, (1877) 11 Hun 147, affirmed without opinion *Bremer v. Penniman*, (1878) 72 N. Y. 603. And the validity of a testamentary provision is to be determined by the legality of the ultimate disposition of the corpus of the estate for which the power of sale or disposition is given. *Whitefield v. Crissman*, (1908) 123 App. Div. 233, 108 N. Y. S. 110. See also *Garvey v. McDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457; *Stoiber v. Stoiber*, (1899) 40 App. Div. 156, 57 N. Y. S. 916.

Effect of power of trustee to sell and reinvest.—A testamentary trust for a period in excess of the statutory limitation upon the suspension of the power of alienation is not saved from the condemnation of the statute by the fact that the trustee is empowered to sell the trust property and to invest and reinvest the proceeds, where, notwithstanding the power of sale and its incidents, the estate remains fettered by the trust. *Allen v. Allen*, (1896) 149 N. Y. 280, 43 N. E. 626, affirming 63 Hun 635 mem., 19 N. Y. S. 419. See also *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570; *Hagemeyer v. Saulpaugh*, (1904) 97 App. Div. 535, 90 N. Y. S. 228.

Limitation of absolute gift.—An absolute gift by a will cannot be cut down by a later provision, unless the intention to do so is expressed in language as plain, definite and certain as is used in making the original gift. *Herzog v. Title Guaratee, etc., Co.*, (1903) 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146, reversing 85 App. Div. 549, 83 N. Y. S. 548; *Banzer v. Banzer*, (1898) 156 N. Y. 429, 51 N. E. 291, affirming 11 Misc. 310, 32 N. Y. S. 266. See also *Mee v. Gordon*, (1907) 187 N. Y. 400, 80 N. E. 353, 116 A. S. R. 613, 10 Ann. Cas. 172, reversing 104 App. Div. 520, 93 N. Y. S. 675. Nor will a vested gift, otherwise valid, fail merely because it is limited to take effect at the expiration of a trust which is void under the statute of perpetuities. *Matter of Berry*, (1913) 154 App. Div. 509, 139 N. Y. S. 186, affirmed (1913) 209 N. Y. 540 mem. And an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate. *Tiers v. Tiers*, (1885) 98 N. Y. 568, affirming 32 Hun 184; *Harrison v. Harrison*, (1867) 36 N. Y. 543, affirming 42 Barb. 162.

Devise to one and in case of his death to another.—The rule is well settled that when there is a devise or bequest to one person and in case of his death to another, the contingency referred to is a death in the lifetime of the testator. But this rule has no application when the first devisee or legatee takes a life estate and is applied only when the prior gift is absolute and unrestricted. And many cases could be cited where the courts, having construed the prior estate to be less than an absolute fee, have held that the words of contingency referred to a death whenever it may happen. *Fowler v. Ingersoll*, (1891) 127 N. Y. 472, 28 N. E. 471. See also *Matter of New York, etc., R. Co.*, (1887) 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478; *Nellis v. Nellis*, (1885) 99 N. Y. 505, 3 N. E. 59.

Gift of residuary estate in trust to pay annuity to widow and balance to children during lives of two children.—Where the will of a testator who left his wife, a sister, two daughters, and grandchildren surviving, gave the entire estate, real and personal, remaining after payment of debts, to his executors in trust to pay his wife \$500 a year during life in lieu of dower; to pay his sister \$400 a year during life, and to pay the remainder of the income to his two daughters, one-half to each, during life, and provided that if either daughter died during the life of the other, without leaving issue, the survivor should take her deceased sister's share; that if either died during the life of the other leaving issue, the issue should take; and that at the death of the two daughters, the trust property should go to their children absolutely, one-half to the children of each, per stirpes, it was held, that

there was created a valid trust dependent, as to its duration, upon the lives of the two daughters; that the annuities to the wife and sister were a charge upon the residuary estate, whether held in trust or freed therefrom by the falling in of the selected lives; and that, at the termination of the trust, the present value of the annuities should be ascertained and the amount paid over to the annuitants, and the remainder of the estate distributed to the remaindermen, discharged of any lien. *Buchman v. Little*, (1897) 154 N. Y. 147, 47 N. E. 970, modifying 6 App. Div. 527, 39 N. Y. S. 671. See also *People's Trust Co. v. Flynn*, (1907) 188 N. Y. 385, 80 N. E. 1098, reversing 113 App. Div. 683, 99 N. Y. S. 979.

Contingent remainder in fee.—The meaning of the exception named in the statute, that a "contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years," has been stated as follows: The revisers, intended to adopt the English limit of suspension, viz., lives in being and twenty-one years afterward, with a modification reducing the lives to two and providing that the twenty-one years, instead of being an absolute term, must depend upon the continuance of the minority of the person to whom the defeasible remainder in fee is limited. *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348. See also *Seitz v. Faversham*, (1912) 205 N. Y. 197, 98 N. E. 385, modifying 141 App. Div. 903, 126 N. Y. S. 801. The policy of the state has been to shorten rather than to extend the future limitations of estates. *Chwatal v. Schreiner*, (1896) 148 N. Y. 683, 43 N. E. 166, affirming 77 Hun 611, 29 N. Y. S. 1142.

Limitation of contingent remainder in fee.—While a contingent remainder in fee may be limited on a prior remainder in fee the limitation must end within the period prescribed. If a remainder in fee were limited on the death of the youngest issue in its broadest sense, it might not take effect until the death of one of the parents and not until after the minority of a possible unborn child and the one on whose minority the trust depends, except as to one share, is not the person to whom the remainder, or substituted remainder, is given. *Seitz v. Faversham*, (1912) 205 N. Y. 197, 98 N. E. 385, modifying 141 App. Div. 903, 126 N. Y. S. 801. See also *Matter of Wilcox*, (1909) 194 N. Y. 288, 87 N. E. 497, reversing 125 App. Div. 152, 109 N. Y. S. 564. It is no objection to the validity of a remainder in fee that it is limited in favor of persons not in being when the limitation is created, or who are not ascertainable until the termination of the precedent estate, provided the contingency upon which it depends must happen within or not beyond the prescribed period for the vesting of estates. *Purdy v. Hayt*, (1883) 92 N. Y. 446; *Central Trust Co. v. Falek*, (1917) 164 N. Y. S. 473. So where a testator bequeathed to each and every grandchild born within twenty years after his death and before final settlement of his estate, \$1,000, to be paid to each on reaching full age, or, if granddaughters, upon their earlier marriage, it was held that these legacies were present gifts of distinct portions of the testator's property, which became vested in each grandchild at birth, and that there was no illegal suspension of the absolute ownership. *Smith v. Edwards*, (1882) 88 N. Y. 92, affirming 23 Hun 223.

Gift of rents and income.—A testamentary gift of the rents and profits of land, or gift of the income arising from personal property, vests such an estate in the devisee or legatee as conforms to the evident intention of the testator. The fact that the executors, as such, may have to deal with the income of the vested interests in order to carry out the provisions of the will does not create any illegal suspension of the power of alienation. *Durfee v. Pomeroy*, (1898) 154 N. Y. 583, 49 N. E. 132, reversing 7 App. Div. 431, 40 N. Y. S. 1022. See also *Cook v. Lowry*, (1884) 95 N. Y. 103, modifying 29 Hun 20. A testator may suspend the absolute power of alienation for a period of two selected lives in being at the creation of the estate, and during that time he may make such disposition of the annual income among as many persons as he sees fit. *Schermerhorn v. Cotting*, (1892) 131 N. Y. 48, 29 N. E. 980. But a residuary bequest and devise to trustees to collect rents, issues and profits, to apply the same to the costs of the maintenance of the trust estate and to accumulate the surplus during the minority of four grandchildren of testator, with equitable cross remainders in the trust fund, in the event that any grandchild dies before reaching majority, with legal remainders over to charity in the event that all the grandchildren die before arriving at full age, violates the statute as to perpetuities and is, therefore,

void. *Matter of Raab*, (1913) 79 Misc. 185, 139 N. Y. S. 869. A trust to receive the rents and profits and apply them to the use of the issue of a testator's infant children, for a period not exceeding two lives in being, is not void because the beneficiaries are not ascertained. *Woodgate v. Fleet*, (1876) 64 N. Y. 566, reversing 3 Hun 619; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492.

Devise to corporation to be formed after testator's death.—It has long been settled in this state that a person may by will devise and bequeath property to a corporation to be formed after his death if it is therein provided that such corporation shall be so formed and the property vest in it within a period not longer than the lives of two persons in being at the time of the execution of the instrument. *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382; *Burrill v. Boardman*, (1871) 43 N. Y. 254, 3 Am. Rep. 694. See also *Hope v. Brewer*, (1892) 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; *Longheed v. Dykeman's Baptist Church*, (1891) 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410, affirming 58 Hun 364, 12 N. Y. S. 207; *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *People v. Simonson*, (1891) 126 N. Y. 299, 27 N. E. 380; *Cruikshank v. Home for Friendless*, (1889) 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140; *Shipman v. Rollins*, (1885) 98 N. Y. 311, 15 Abb. N. Cas. 288, reversing 33 Hun 89; *Bascom v. Albertson*, (1866) 34 N. Y. 584, affirming 1 Redf. 340; *Jessup v. Pringle Memorial Home*, (1899) 27 Misc. 427, 59 N. Y. S. 207, affirmed 47 App. Div. 622, 62 N. Y. S. 308. Where the trustees of a trust for an original charity, undertaken to be created by will, with no direction for the formation of a corporation, are named by the testator and expressly prohibited from holding any portion of the testator's property longer than the lives of two persons in being named in the will, it is to be deemed that the trustees are charged with the management and conduct of the trust until the expiration of the period measured by the two lives, at which time the title to the trust property will vest in the Supreme Court under the statute. *Allen v. Stevens*, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8. See also *Bigelow v. Tilden*, (1896) 18 Misc. 689, 43 N. Y. S. 858. Corporations created for charitable or religious purposes, and authorized by their charters to take and hold property, may competently do so, even when only the income might be expended and the principal is to be permanently kept. The fact of incorporation with such a power exempts them from the operation of the statute against perpetuities. *Matter of Griffin*, (1901) 167 N. Y. 71, 60 N. E. 284, reversing 45 App. Div. 102, 61 N. Y. S. 639. See also *Holmes v. Mead*, (1873) 52 N. Y. 332; *Driscoll v. Hewlett*, (1909) 132 App. Div. 125, 116 N. Y. S. 466, affirmed (1910) 198 N. Y. 297 mem.

Suspension as applied to personal property.—The provision against any provision whereby the absolute ownership is suspended for a longer period than during the continuance and until the termination of two lives in being at the death of the testator applies equally to real and personal property. *Mausbach v. New*, (1901) 58 App. Div. 191, 68 N. Y. S. 674, affirmed without opinion (1902) 170 N. Y. 585, 63 N. E. 1119.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092, which affirmed 52 Misc. 407, 102 N. Y. S. 157; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5.

§ 43. Limitation of successive estates for life. Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.

This section was derived from Real Property Law of 1896, § 33.

Section 43 of the Real Property Law of 1896, is now covered by section 53. *Proceedings to discover death of life tenant*: see Code Civ. Pro., § 2302 et seq.

General application.—The section is rendered applicable only to that class of cases where more than two successive life estates are provided for to precede the final vesting of the remainder. *Schettler v. Smith*, (1869) 41 N. Y. 328.

Application of section to suspension of power of alienation.—The prohibition against the creation of more than two successive life estates in the same property has no necessary connection with the law of perpetuities. There is no suspense of the power of alienation of land by the creation of successive life estates therein unless they are contingent. Any number of successive vested life estates may be created without violating the statute of perpetuities. The prohibition against creating more than two successive life estates in the same property applies to such estates, whether vested or contingent. *Purdy v. Hayt*, (1883) 92 N. Y. 446. See also *Matter of Ryder*, (1899) 41 App. Div. 247, 58 N. Y. S. 635. The provisions of the section are in harmony with the general rule which prescribes the period during which the power of alienation may be suspended, viz., two lives in being at the creation of the estate. (See *supra*, § 42.) The statute, however, does not avoid the whole limitation where more than two successive life estates are created. It allows the first two to take effect, avoiding those only which are in excess of that number. If the right of the remainderman is vested, and the right of possession only is postponed, the statute, in case of an attempted creation of two precedent estates for life, accelerates the period fixed by the will for the vesting of the remainder in possession and vests it immediately upon the termination of the two estates first created. In such case, the intention of the testator gives way to the positive provisions of the statute. *Vandenburgh v. Vandenburgh*, (1914) 85 Misc. 131, 147 N. Y. S. 244. And the provisions to the effect that when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, refers to estates in which the remainder is vested and is not contingent, and in such estates the power of alienation is not suspended. *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21. See also *Graham v. Graham*, (1905) 49 Misc. 4, 97 N. Y. S. 779. So, a trust for the lives of two sons, created by a testatrix in the remainder of her estate, limited upon a life estate to her husband, with an ultimate remainder to her grandchildren who should be living at the death of both sons, does not unlawfully suspend the power of alienation. Nor does the will offend the statute limiting successive life estates to two persons in being, the estate in the trustees being but a single estate. *Matter of Hurlbat*, (1906) 51 Misc. 263, 100 N. Y. S. 1098. Whether a devise is either valid or void in its creation depends upon the question whether a contingency might happen which would suspend the power of alienation beyond the period limited by statute. *De Barante v. Gott*, (1849) 6 Barb. 492.

Application of section to future estates.—The section applies only to present, and not to future estates, and the effect of this is not confined merely to that part of the property whose alienation may be illegally suspended, "but it is broader, it destroys the future estate itself, and destroys it in toto, because it declares it void in its very creation." *Vail v. Vail*, (1849) 7 Barb. 226, affirmed 10 Barb. 69.

Vested remainder on two successive life estates.—Under this section a vested remainder can be created on two successive life estates and no more, and if a third life estate is attempted to be created prior to the absolute vesting of the remainder it would be cut off and eliminated by force of the provisions of section 45, and the prior estates will be held to be good. Thus, successive life estates to A., B., and C., with remainder over to D. (a person in being), violates the provisions of this section as being an unlawful limitation, but would not offend the statute of perpetuities, because the owners of the several life estates, joining with the tenant in remainder, could convey an absolute fee in possession. In other words, it would satisfy the test that there must be persons in being by whom an absolute fee in possession can be conveyed. Under this rule it is unimportant how many or what estates are existing in the property, whether they are vested or contingent, whether there are many or few owners of the estates and interests, for, if by uniting

they can convey an absolute estate in possession, there is no suspension whatever. *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879. So, where, by a devise, a remainder is limited upon three or more successive estates for life, all of the life estates subsequent to the first two are void, but their illegality does not affect the prior ones: these, by necessary implication are valid, and the remainder takes effect upon their expiration, in the same manner as if no other life estates had been created. *Woodruff v. Cook*, (1875) 61 N. Y. 638, affirming 47 Barb. 304.

Successive life estates with remainder to a class.—Where a testatrix devised certain real property to her five children for life and provided that upon the death of any of such children those surviving should inherit the life interest of the deceased share and share alike, and that, upon the death of the last surviving child, the property ceasing to be a life interest should pass to her grandchildren share and share alike, and the testatrix left her surviving the five children and certain grandchildren, it was held that the will was not void in its entirety as unlawfully suspending the power of alienation; that the devise in remainder after the termination of the two valid life estates was to a class, namely, the grandchildren of the testatrix; and that this remainder vested in them immediately subject to open and let in after-born grandchildren and to be terminated by the death of either during such time. *Wells v. Rowland*, (1913) 155 App. Div. 354, 140 N. Y. S. 341. The rule is that under a gift to a class each member of the class that comes into being before the time for distribution shares in the gift. *Matter of Ryder*, (1899) 41 App. Div. 247, 58 N. Y. S. 635.

Application of section to trusts.—It has been held that the rule embodied in this section has never been applied to the case of a trust, and that its application has been confined to life estates in which the legal title is in the life tenant. *La Farge v. Brown*, (1898) 31 App. Div. 542, 52 N. Y. S. 93; *In re Abbey*, (1917) 98 Misc. 506, 164 N. Y. S. 934.

Rule of law as to vesting of estates.—Where title is to vest at the termination of two life estates, so that the persons entitled to the remainder are fixed and certain at that time, then any life estate in excess of those allowed by the statute must necessarily be eliminated, and the property at the expiration of two life estates should then be delivered to those who, as remaindermen, are entitled to the same, as it is well settled that, where property can be held as vesting, courts will so hold, rather than to postpone the same, or render it contingent upon the happening of some event, where such vesting is consistent with the intent of the testator. *Matter of Conger*, (1903) 40 Misc. 157, 81 N. Y. S. 733. See also *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5. And where a clause in a will is susceptible of two constructions, one of which will render it valid, and the other invalid, the former will be adopted in order to favor the vesting of the estate. *Crozier v. Bray*, (1890) 120 N. Y. 366, 24 N. E. 712; *Roe v. Vingut*, (1889) 117 N. Y. 204, 22 N. E. 933; *Matteson v. Palser*, (1903) 56 App. Div. 91, 67 N. Y. S. 612, modified on other grounds (1903) 173 N. Y. 404, 66 N. E. 110; *Coon v. Coon*, (1902) 38 Misc. 693, 78 N. Y. S. 245. See also *Salmon v. Stuyvesant*, (1836) 16 Wend. 321.

Cited.—This section was cited in *Bailey v. Bailey*, (1884) 97 N. Y. 460, modifying 28 Hun 603; *Whitefield v. Crissman*, (1908) 123 App. Div. 233, 108 N. Y. S. 110.

§ 44. Remainders on estates for life of third person. A remainder shall not be created on an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created on such an estate in a term of years, unless it be for the whole residue of such term.

This section was derived from Real Property Law of 1896, § 34.

Section 44 of the Real Property Law of 1896 is now covered by section 54.

Suspension of ownership of personal property: see PERSONAL PROPERTY LAW, § 11.

Application of section to personal property.—The rule laid down by the section is the same for personal property as for real property. *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Matter of Bogardus*, (1904) 43 Misc. 473, 89 N. Y. S. 478.

Trust of remainder less than a fee.—Where a will attempted to create in a fund, (1) an estate in the residuary legatees as tenants in common for the life of one who was not one of such residuary legatees, (2) an estate in a portion of the fund in the executor as trustee for one of his daughters for her life, and an estate in another portion of the fund in the executor as trustee for another daughter for her life, and (3) an estate in the residuary legatees as tenants in common for the remainders, it was held that the bequests to the executor as trustee for the daughters were void. *Matter of Bogardus*, (1904) 43 Misc. 473, 89 N. Y. S. 478.

§ 45. When remainder to take effect if estate be for lives of more than two persons. When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced.

This section was derived from Real Property Law of 1896, § 35.

Section 45 of the Real Property Law of 1896 is now covered by section 55.

Definition of remainder: see supra, § 38.

Proceedings to discover death of life tenant: see Code Civ. Pro., § 2302 et seq.

Effect of section in general.—The effect, as well as the language, of the statute is to terminate the suspension at the end of the first two lives, in the same manner as though no succeeding life estates were intended to be created. *Woodruff v. Cook*, (1875) 61 N. Y. 638, affirming 47 Barb. 304; *Bailey v. Bailey*, (1883) 26 Hun 603, modified on other grounds (1884) 97 N. Y. 460.

Cited.—This section was cited in *Westerfield v. Westerfield*, (1850) 1 Bradf. 137.

§ 46. Contingent remainder on term of years. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or on the termination thereof.

This section was derived from Real Property Law of 1896, § 36.

Section 46 of the Real Property Law of 1896 is now covered by section 56.

When remainder not limited on contingency defeating precedent estate takes effect: see infra, § 55.

Cited.—This section was cited in *Whitefield v. Crissman*, (1908) 123 App. Div. 233, 108 N. Y. S. 110.

§ 47. Estate for life as remainder on term of years. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

This section was derived from Real Property Law of 1896, § 37.

Section 47 of the Real Property Law of 1896 is now covered by section 57.

Suspension of power of alienation: see supra, § 42.

Rule applied.—A provision in a will that trustees in whom real and personal estate is vested shall apply the rents and profits to the use of the

testator's infant children and their unborn issue for the lives of the two youngest of three children, though by possibility two or more successive generations may enjoy the benefit for their lives, respectively, does not contravene the statute against the creation of successive life estates, or of a remainder for life upon a term for years, in favor of persons not in being. *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492. When a testator in one clause devises lands to his wife for life with remainder over at her death, and in a subsequent clause bequeaths all the personal property to his wife with a proviso that "whatever personal estate may remain at the decease of my wife I give and bequeath to" other persons named, the beneficial power of disposal of the personal property by the widow does not invalidate the remainder over either at common law or under the statute. *Tuthill v. Davis*, (1907) 121 App. Div. 290, 105 N. Y. S. 672.

§ 48. Meaning of heirs and issue in certain remainders.

Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

This section was derived from Real Property Law of 1896, § 38.

Section 48 of the Real Property Law of 1896 is now covered by section 58.

Necessity of term "heirs" to create or convey an estate in fee: see infra, § 240.

Terms "living" and "died" as relating to descent and distribution: see DECEDENT ESTATE LAW, § 80, subd. 3.

Meaning of word "intestate": see Code Civ. Pro., § 2768, subd. 1. Term "next of kin": see Code Civ. Pro., §§ 1870, 2768, subd. 12.

"Heirs at law," "heirs," and the like as including widow: see Ann. Cas. 1915D 1178 note.

"Heirs" as meaning children: see Ann. Cas. 1915B 70 note; 1 L. R. A. (N. S.) 319 note.

"Niece" or "nephew" as including grandniece or grandnephew: see Ann. Cas. 1913E 589 note.

"Natural heirs": see 45 L. R. A. (N. S.) 1163 note.

Extrinsic evidence to identify person referred to by term "heir" as used in will: see 47 L. R. A. (N. S.) 533 note.

Character of estate as ancestral or nonancestral as determined by legal or equitable title: see Ann. Cas. 1914C 407 note.

Rule prior to statute.—The rule of construction prior to the statute was that the limitation had reference to an indefinite failure of heirs or heirs of the body. *Seaman v. Harvey*, (1878) 16 Hun 71; *Wilson v. Wilson*, (1866) 32 Barb. 328; *Paterson v. Ellis*, (1833) 11 Wend. 259; *Rathbone v. Dyckman*, (1831) 3 Paige 9.

The artificial rules of construction based in part on the use or absence of the words "heirs," or "issue," which were in force prior to the Revised Statutes, no longer obtain; and the controlling factor now is the intention of the testator and the testamentary scheme, which is to be gathered from a reading of the entire will. *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5.

Dying without issue.—The term "dying without issue" means without leaving issue at the time of the death of the first taker. *Rathbone v. Dyckman*, (1831) 3 Paige 9; *Bowman v. Tallman*, (1864) 27 How. Pr. 212, affirmed 40 How. Pr. 1. But where there are indications in the will that the gift over shall take effect upon the death of the first taker without issue at any time, either before or after the death of the testator, the rule of construction which applies to the words "death without issue," when standing alone, does not apply, and courts will lay hold of slight circumstances to vary the construction, and to give effect to the language according to its natural import. *Vanderzee v. Slingerland*, (1886) 103 N. Y. 47, 8 N. E. 247, 57 Am. Rep. 701. See also *Mead v. Mahen*, (1892) 131 N. Y. 255, 30 N. E. 98, reversing 60 Hun 268, 14 N. Y. S. 732, 38 N. Y. St. Rep. 204; *Matter of New York, etc., R. Co.*, (1887) 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478.

Meaning of "heirs."—The words "heirs," when used in a will or other instrument, is to be understood in its primary or legal sense, unless it appears from other parts of the instrument that it was used in the more restricted sense of children, heirs of the body or descendants. *Matter of Cramer*, (1902) 170 N. Y. 271, 63 N. E. 279, affirming 59 App. Div. 541. 69 N. Y. S. 299; *Johnson v. Brasington*, (1898) 156 N. Y. 181, 50 N. E. 859, reversing 86 Hun 106; *Arnot v. Arnot*, (1902) 75 App. Div. 230, 78 N. Y. S. 20; *Armstrong v. Galusha*, (1899) 43 App. Div. 248, 60 N. Y. S. 1; *Matter of Fay*, (1912) 77 Misc. 514, 137 N. Y. S. 983. The word "heirs" is a legal term having a definite meaning, and expresses the relation of persons to a deceased ancestor and not to a living person, and its primary import relates to the succession of real property. *Cushman v. Horton*, (1874) 59 N. Y. 149, reversing 1 Hun 601, 4 Thomp. & C. 103; *Spicer v. Connor*, (1911) 148 App. Div. 334, 132 N. Y. S. 877. And where the word "heirs" is used in a will so as to mean children or descendants it is the duty of the court to give it that meaning. *Heath v. Hewitt*, (1891) 127 N. Y. 166, 27 N. E. 959, 24 A. S. R. 438, affirming 49 Hun 12, 1 N. Y. S. 492; *Hard v. Ashley*, (1890) 117 N. Y. 606, 23 N. E. 177, reversing *Surdam v. Cornell*, (1889) 116 N. Y. 305, 22 N. E. 450; *Matter of New York, etc., R. Co.*, (1887) 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478; *Lytle v. Beveridge*, (1874) 58 N. Y. 592, affirming 7 Lans. 225; *Scott v. Guernsey*, (1871) 48 N. Y. 106, affirming 60 Barb. 163; *Bundy v. Bundy*, (1868) 38 N. Y. 410, affirming 47 Barb. 135; *Norris v. Beye*, (1855) 13 N. Y. 273; *Canfield v. Fallon*, (1899) 26 Misc. 345, 57 N. Y. S. 149, exceptions overruled 43 App. Div. 561, 57 N. Y. S. 149, affirmed (1899) 161 N. Y. 623, 55 N. E. 1093; *Hard v. Davison*, (1889) 53 Hun 112, 6 N. Y. S. 69, reversed on other grounds (1890) 117 N. Y. 606.

Where lands are devised to a person and his heirs, with a remainder to one who will be a collateral heir of the first devisee, the word "heirs" will be construed to mean heirs of the body or issue. *Smith v. Scholtz*, (1877) 68 N. Y. 41. See also *Taggart v. Murray*, (1873) 53 N. Y. 233.

The word "heirs," when used in connection with personal property, means the next of kin of a decedent, or "those related by blood, who take personal estate of one who dies intestate." *Tillman v. Davis*, (1884) 95 N. Y. 17, 47 Am. Rep. 1; *Matter of Schnitzler*, (1908) 61 Misc. 218, 114 N. Y. S. 934.

A clause in a will providing that "I give and bequeath the sum of two thousand five hundred dollars to my son M., to be paid to him by the executors of this my will, and to be held, used and enjoyed by him, my said son, during his life, and at his death to his heir or heirs, should he have any; should he die without issue, I give and bequeath said sum of two thousand five hundred dollars to my son A." was held to constitute a gift to M. of a life estate only, the principal to go to A. upon the death of M. without descendants, and the term "his heir or heirs," in the connection in which it is used, meant "heirs of his body." *Snider v. Snider*, (1899) 160 N. Y. 151, 54 N. E. 676, affirming 11 App. Div. 171, 42 N. Y. S. 613.

Where the will of a widower, whose only children were two sons, unmarried at the date of the will, gave the use and occupancy of the estate, to the testator's two sons, and the survivor of them, during life, and gave the estate, after the death of the "two sons and their heirs, if they have any," to the testator's brothers and sisters, it was held that the "heirs" or the sons referred to were intended to be their heirs of the body, and that the testator intended the estate to vest in such heirs; and they must be deemed to take an estate by implication. *Matter of Moore*, (1897) 152 N. Y. 602, 46 N. E. 960, affirming 88 Hun 621, 34 N. Y. S. 1144. Where a testatrix gave certain property to her daughter during the term of her natural life "with further power to give, devise and bequeath upon her death by last will and testament duly executed, to such of my heirs as she may prefer," it was held that the term "heirs" was not to be extended to include issue or descendants who were not heirs of the testatrix; that the power of appointment so given must be exercised in favor of the heirs of testatrix, who were to be ascertained at the death of the life tenant and donee of the power. *Wallace v. Diehl*, (1911) 202 N. Y. 156, 95 N. E. 646, 33 L. R. A. (N. S.) 9, modifying 134 App. Div. 942, 118 N. Y. S. 1149.

The word "heirs," as used in a clause "I give and bequeath to the heirs which my daughter . . . now has and which she may hereafter have,"

was held to refer to the children which the daughter then had or might thereafter have. *Spicer v. Connor*, (1911) 148 App. Div. 334, 132 N. Y. S. 877.

Word "heirs" as term of limitation.—The word "heirs" is a word of inheritance used to define the extent of the estate devised, and not to qualify the interest of the devisees. In other words, it is a term of limitation and not of purchase. *Matter of Allen*, (1896) 151 N. Y. 243, 45 N. E. 554, affirming 81 Hun 91, 30 N. Y. S. 683; *Matter of Wills*, (1889) 113 N. Y. 396, 21 N. E. 137, 10 A. S. R. 457; *Thurber v. Chambers*, (1876) 66 N. Y. 42, modifying 4 Hun 721 as to costs; *Matter of Allison*, (1907) 53 Misc. 222, 102 N. Y. S. 887, affirmed 122 App. Div. 898, affirmed (1909) 194 N. Y. 540 mem. But while generally and technically conveying the idea of representation, it is not necessary always to be understood in that sense. Though a word of limitation, it may be used as one of designation of the devisees in whom at a fixed time the estate devised shall vest in possession. *Bisson v. West Shore R. Co.*, (1894) 143 N. Y. 125, 38 N. E. 104, affirming 66 Hun 604, 22 N. Y. S. 31.

Meaning of word "issue."—The word "issue" is an ambiguous term. It may mean descendants generally or mere children; and whether in a will it shall be held to mean the one or the other depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered. *New York Life Ins., etc., Co. v. Viele*, (1899) 161 N. Y. 11, 55 N. E. 311, 76 A. S. R. 238, affirming 22 App. Div. 80, 47 N. Y. S. 841; *Palmer v. Horn*, (1881) 84 N. Y. 516, affirming 20 Hun 70; *Bassett v. Wells*, (1907) 56 Misc. 81, 106 N. Y. S. 1068; *Matter of United States Trust Co.*, (1901) 36 Misc. 378, 73 N. Y. S. 635; *Matter of Devoe*, (1901) 66 App. Div. 1, 72 N. Y. S. 962, affirmed (1902) 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536; *Hilliker v. Bast*, (1901) 64 App. Div. 552, 72 N. Y. S. 301. And when the word "issue" is used in a will, unexplained by the context, it has the meaning of descendants of every degree of remoteness. *Schmidt v. Jewett*, (1909) 195 N. Y. 486, 88 N. E. 1110, 133 A. S. R. 815, affirming 127 App. Div. 376, 111 N. Y. S. 680; *Chwatal v. Schreiner*, (1896) 148 N. Y. 683, 43 N. E. 166, affirming 77 Hun 611, 29 N. Y. S. 1142; *Soper v. Brown*, (1892) 136 N. Y. 244, 32 N. E. 768, 32 A. S. R. 731, affirming 65 Hun 155, 20 N. Y. S. 30; *Drake v. Drake*, (1892) 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664, affirming 56 Hun 590, 10 N. Y. S. 183; *Rasquin v. Hamersley*, (1912) 152 App. Div. 522, 137 N. Y. S. 578, affirmed (1913) 208 N. Y. 630 mem.; *Seitz v. Faversham*, (1910) 141 App. Div. 903, 126 N. Y. S. 801; *Riker v. Gwynne*, (1910) 139 App. Div. 423, 124 N. Y. S. 124; *Kernochan v. Whitney*, (1908) 125 App. Div. 371, 109 N. Y. S. 721; *Matter of Tenney*, (1905) 104 App. Div. 290, 93 N. Y. S. 811; *Emmet v. Emmet*, (1901) 67 App. Div. 183, 73 N. Y. S. 614; *Bodine v. Brown*, (1896) 12 App. Div. 335, 42 N. Y. S. 202, affirmed without opinion (1898) 154 N. Y. 778, 49 N. E. 1093; *Matter of Bauerdorf*, (1912) 77 Misc. 656, 138 N. Y. S. 673; *Metropolitan Trust Co. v. Rankin*, (1911) 74 Misc. 542, 134 N. Y. S. 462; *Harrison v. McAdam*, (1902) 38 Misc. 18, 76 N. Y. S. 701. It would not, however, include the heirs at law of a person dying without children. *Bodine v. Brown*, (1896) 12 App. Div. 335, 42 N. Y. S. 202, affirmed without opinion (1898) 154 N. Y. 778, 49 N. E. 1093.

But when the term "issue" is used to describe a devise to a person and his issue, it is considered as a term of limitation and not of purchase. *Drake v. Drake*, (1892) 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664, affirming 56 Hun 590, 10 N. Y. S. 183; *Hilliker v. Bast*, (1901) 64 App. Div. 552, 72 N. Y. S. 301.

Lawful issue.—The words "lawful issue," when used in a domestic will, primarily and generally mean descendants; and where there is nothing to the contrary in the context, or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used in a will. *New York Life Ins., etc., Co. v. Viele*, (1899) 161 N. Y. 11, 55 N. E. 311, 76 A. S. R. 238, affirming 22 App. Div. 80, 47 N. Y. S. 841; *Phelps v. Cameron*, (1905) 109 App. Div. 798, 96 N. Y. S. 1014. But when the word "issue" relating to children is qualified by the adjective "lawful," it is ordinarily understood to mean those begotten and born in lawful wedlock, and none others. *Central Trust Co. v. Skillin*, (1912) 154 App. Div. 227, 138 N. Y. S. 884; *United States Trust Co. v. Maxwell*, (1899) 26 Misc. 276, 57 N. Y. S. 53. In one notable instance, however, a devise to children was held to include the illegitimate children of the testator and to exclude his lawful

issue. *Gelston v. Shields*, (1879) 78 N. Y. 275, affirming 16 Hun 143. And the words "lawful issue" have been held not to include an adopted child. *Matter of Leask*, (1910) 197 N. Y. 193, 90 N. E. 652, 134 A. S. R. 866, 18 Ann. Cas. 516, 27 L. R. A. (N. S.) 1158, affirming 130 App. Div. 898, 115 N. Y. S. 1124; *Matter of Hopkins*, (1905) 102 App. Div. 458, 92 N. Y. S. 463. See also *New York Life Ins., etc., Co. v. Viele*, (1899) 161 N. Y. 11, 55 N. E. 311, 76 A. S. R. 238, affirming 22 App. Div. 80, 47 N. Y. S. 841. The term "lawful issue" may include a grandchild. *Harrison v. McAdam*, (1902) 38 Misc. 18, 76 N. Y. S. 701.

Word "issue" in sense of "children."—The word "issue," as a word of purchase, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally; but when it is apparent from extrinsic circumstances properly considered, or from the provisions of the will, that the testator intended to use the word "issue" in the sense of "children," its meaning will be so limited. *Clark v. Kittenplan*, (1909) 63 Misc. 122, 118 N. Y. S. 404. See also *Chwatal v. Schreiner*, (1896) 148 N. Y. 683, 43 N. E. 166, affirming 77 Hun 611, 29 N. Y. S. 1142; *Soper v. Brown*, (1892) 136 N. Y. 244, 32 N. E. 768, 32 A. S. R. 731, affirming 65 Hun 155, 20 N. Y. S. 30.

Legal representatives.—While technically "legal representatives" mean executors or administrators, they may refer to heirs or next of kin. A representative is one who stands in the place of another, of real estate as heir, of personality as next of kin. He is one also who takes by representation and in wills and settlements the term representatives and legal representation are frequently held to mean heirs and next of kin, and not executors and administrators. *Griswold v. Sawyer*, (1891) 125 N. Y. 411, 26 N. E. 464, reversing 56 Hun 12, 8 N. Y. S. 517, 56a, 960; *Davidson v. Jones*, (1906) 112 App. Div. 254, 98 N. Y. S. 265; *Lee v. Dill*, (1863) 39 Barb. 516, affirmed (1869) 41 N. Y. 619.

Next of kin.—The words "next of kin" do not include a widow or husband. *Tillman v. Davis*, (1884) 95 N. Y. 17, 47 Am. Rep. 1; *Bayley v. Beekman*, (1909) 62 Misc. 567, 117 N. Y. S. 88, affirmed 133 App. Div. 888 men., 118 N. Y. S. 286, judgment affirmed (1910) 197 N. Y. 593, 91 N. E. 1110; *Hess v. Zahn*, (1908) 57 Misc. 515, 107 N. Y. S. 951.

Meaning of word "children."—The word "children," in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as the ancestor. *Matter of Pulis*, (1917) 220 N. Y. 196, 115 N. E. 516, modifying 175 App. Div. 884 160 N. Y. S. 1143; *Palmer v. Horn*, (1881) 84 N. Y. 516, affirming 20 Hun 70; *Davies v. Davies*, (1908) 129 App. Div. 379, 113 N. Y. S. 872, affirmed without opinion (1910) 197 N. Y. 598, 91 N. E. 1111.

For note on question whether "children" is a word of purchase or limitation, see 12 L. R. A. (N. S.) 283.

Cited.—This section was cited in *Schlereth v. Schlereth*, (1903) 173 N. Y. 444, 66 N. E. 130, 53 A. S. R. 616, affirming 73 App. Div. 283, 76 N. Y. S. 676.

§ 49. Limitations of chattels real. All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

This section was derived from Real Property Law of 1896, § 39.

Section 49 of the Real Property Law of 1896 is now covered by section 59.

Estates for years and for life of third person as chattels real: see supra, §§ 33, 34.

Suspension of power of alienation generally: see supra, § 42.

Effect of judgment on chattels real: see Code Civ. Proc., § 1251.

Origin of rule against perpetuities.—It was in the development of the rules in relation to executory devises of chattels real that the rule against

perpetuities had its origin and took its shape. *Mills v. Mills*, (1900) 50 App. Div. 221, 63 N. Y. S. 771.

Distinction between chattels personal and real.—The law fully recognizes the distinction between chattels personal and real. The former division includes movable things only, as belonging immediately to the person; chattels real are such as concern and savor only of the realty, as terms for years, and are immovable. Such interests are chattels real, because of their immobility and because they have not a sufficient legal and indeterminate duration. *Putnam v. Westcott*, (1821) 19 Johns. 73. See also *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166.

Chattel mortgage of chattels real.—Section 230 of the Lien Law, relating to the filing of chattel mortgages, does not extend to leasehold interests in real estate or "chattels real," as they are sometimes called, and where a mortgage, given by a company to a corporation as trustee to secure the payment of its bonds, covered leasehold premises owned by the company and also chattels constituting a theatrical equipment, it was held that it need not, so far as related to the leasehold, be refiled annually. *Booth v. Kehoe*, (1877) 71 N. Y. 341; *State Trust Co. v. Casino Co.*, (1896) 18 Misc. 327, 41 N. Y. S. 1, affirmed 19 App. Div. 344, 36 N. Y. S. 492.

Trust estates in chattels real.—The law in relation to limitation and perpetuities apply to chattels real, and they are therefore within the provisions of the statute relating to uses and trusts. *Bennett v. Rosenthal*, (1880) 11 Daly 91.

§ 50. Creation of future and contingent estates. Subject to the provisions of this article, a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.

This section was derived from Real Property Law of 1896, § 40.

Section 50 of the Real Property Law of 1896 is now covered by section 60.

Definitions of future estates: see supra, § 37.

When future estates are vested and when contingent: see supra, § 40.

Power of appointment not to prevent vesting of future estate: see supra, § 41.

Expectant estates as descendible, devisable and alienable: see infra, § 59.

Fee limited upon a fee.—A limitation of a fee upon a fee, though void for repugnancy at common law, is now authorized and the common-law rule no longer obtains. It was intended by the enactment of the Revised Statutes to abolish all artificial or technical restraints of the common law with reference to the transfer of real property that were not expressly retained on the ground of public policy or expediency; and that it was intended to alter the common-law rule that a fee or lesser estate could not be limited upon a fee appears from many provisions expressly providing for such limitation. *Knowlton v. Atkins*, (1892) 134 N. Y. 313, 31 N. E. 914; *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 1166. See also *Matter of Gardner*, (1893) 140 N. Y. 122, 35 N. E. 439, affirming 69 Hun 50, 23 N. Y. S. 429; *Dodge v. Stevens*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443; *Mott v. Ackerman*, (1883) 92 N. Y. 539; *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5; *Matter of McCaffrey*, (1888) 50 Hun 371, 3 N. Y. S. 96. But while a fee may be limited on a fee, upon a contingency, the latter must happen within the prescribed period. *Matter of Wilcox*, (1909) 194 N. Y. 288, 87 N. E. 497, reversing 125 App. Div. 152, 189 N. Y. S. 564; *Sherman v. Sherman*, (1848) 3 Barb. 385.

§ 51. Future estates in the alternative. Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

This section was derived from Real Property Law of 1896, § 41.

Section 51 of the Real Property Law of 1896 is now covered by section 61.

Definition of future estates: see supra, § 37.

When future estates are vested and when contingent: see supra, § 40.

Power of appointment not to prevent vesting of future estate: see supra, § 41.

When expectant estates are defeated and when deemed created: see infra, §§ 57, 64.

Qualities of expectant estates: see infra, § 59.

Common-law rule.—Alternative estates, or contingencies with a double aspect, as they are sometimes called, were permissible and recognized before the Revised Statutes expressly authorized their creation. They were unobjectionable, because only one could vest, and the happening of the contingency merely substituted one for the other, and in no respect prolonged any restraint upon alienation. *Hennessy v. Patterson*, (1881) 85 N. Y. 91. And they are now expressly authorized by statute. *Higgins v. Downs*, (1905) 101 App. Div. 119, 91 N. Y. S. 937.

Limitation on remote event.—Where a limitation is made to take effect on two alternative events, one of which is too remote and the other valid as within the prescribed limits, although the gift is void so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one. *Schettler v. Smith*, (1869) 41 N. Y. 328. See also *Van Schuyver v. Mulford*, (1875) 59 N. Y. 426; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Savage v. Burnham*, (1858) 17 N. Y. 561.

Uncertainty of vesting as affecting alienation.—No contingency resulting from the uncertainty as to which of the alternative future estates will vest or fail to vest can create any restraint on the power of alienation of the remainder. *Boynton v. Lahens*, (1913) 81 Misc. 352, 143 N. Y. S. 499.

Cited.—This section was cited in *Matter of Wilcox*, (1909) 194 N. Y. 288, 87 N. E. 497, reversing 125 App. Div. 152, 109 N. Y. S. 564; *Green v. Head*, (1907) 54 Misc. 454, 104 N. Y. S. 383; *Knowlton v. Atkins*, (1892) 134 N. Y. 313, 31 N. E. 914.

§ 52. Future estate valid though contingency improbable. A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

This section was derived from Real Property Law of 1896, § 42.

Section 52 of the Real Property Law of 1896 is now covered by section 62.

Definition of future estates: see supra, § 37.

When future estates are contingent: see supra, § 40.

Creation of future and contingent estates: see supra, § 50.

§ 53. Conditional limitations. A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation.

This section was derived from Real Property Law of 1896, § 43.

Section 53 of the Real Property Law of 1896 is now covered by section 63.

Definition of remainder: see supra, § 38.

Common-law rule.—A valid limitation over by way of an executory devise at common law is now a contingent remainder or conditional limitation. *Crooke v. Kings County*, (1884) 97 N. Y. 421.

Distinction between condition and conditional limitation.—A condition subsequent followed by a limitation over to a third person in case the condition is not fulfilled, or there is a breach of it, is known as a conditional limitation. A condition brings the estate back to the grantor or his heirs. A conditional limitation carries it over to a stranger. A condition terminates an estate; a limitation creates a new one. *Williams v. Jones*, (1901) 166 N. Y. 522, 60 N. E. 240, reversing 54 App. Div. 349, 66 N. Y. S. 702; *Towle v. Remsen*, (1877) 70 N. Y. 303.

Ultior devise upon defeasance of former one.—An ulterior devise, to take effect upon the defeasance of a former one, will attach as well where the failure of the primary devise is by the happening of some event, such as the death of the devisee during the lifetime of the testator, as by an event occurring after his death, by which the first devise after it has taken effect is defeated, unless the ulterior devise is so connected with and dependent upon the primary one that it cannot consistently with the provisions of the will have effect if the latter fails ab initio. *Williams v. Jones*, (1901) 166 N. Y. 522, 60 N. E. 240, reversing 54 App. Div. 349, 66 N. Y. S. 702. See also *Matter of Miller*, (1899) 161 N. Y. 71, 55 N. E. 385, affirming 11 App. Div. 337, 42 N. Y. S. 148; *Crozier v. Bray*, (1890) 120 N. Y. 366, 24 N. E. 712, affirming 39 Hun 121; *Vanderzee v. Slingerland*, (1886) 103 N. Y. 47, 8 N. E. 247, 57 Am. Rep. 701; *Wager v. Wager*, (1884) 96 N. Y. 164. And the rule is that where a devise is limited to take effect on a condition annexed to a preceding estate, if the preceding estate should never arise, the remainder over will, nevertheless, take place, the first estate being considered only as a preceding condition, to give effect to a subsequent limitation. *United States Trust Co. v. Hogenkamp*, (1908) 191 N. Y. 281, 84 N. E. 74, affirming 115 App. Div. 899, 101 N. Y. S. 1147; *Williams v. Jones*, (1901) 166 N. Y. 522, 60 N. E. 240, reversing 54 App. Div. 349, 66 N. Y. S. 702; *Norris v. Beyea*, (1855) 13 N. Y. 273.

Re-entry on breach of condition subsequent.—A right of re-entry for a breach of a condition subsequent does not pass by a conveyance of the land, nor until there is a re-entry by the grantor or his heirs, or the successors of the grantor for a breach of the condition. The estate is not forfeited, but remains unimpaired in the grantee, and a mere stranger cannot take advantage of it. *Towle v. Remsen*, (1877) 70 N. Y. 303.

§ 54. When heirs of life tenant take as purchasers. Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them.

This section was derived from Real Property Law of 1896, § 44.

Section 54 of the Real Property Law of 1896 is now covered by section 64.

Definition of remainder: see *supra*, § 38.

Proceedings to discover death of life tenant: see Code Civ. Pro., § 2302 et seq.

Cardinal rule of testamentary construction.—A cardinal rule of testamentary construction is that the plain intent of the testator, as evinced by the language of his will must prevail, and such intention must be collected from the whole will taken together. *Roe v. Vint*, (1889) 117 N. Y. 204, 22 N. E. 933; *Byrnes v. Stilwell*, (1886) 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760, modifying 38 Hun 523; *Matter of Hansen*, (1911) 72 Misc. 610, 132 N. Y. S. 257. And where words are equivocal, that explanation shall be given which will preserve consistency, in preference to one which will create inconsistency. If possible some effect shall be given to each distinct provision rather than that it shall be annihilated. *Moak v. Moak*, (1896) 8 App. Div. 197, 40 N. Y. S. 438.

Rule in Shelley's Case.—The rule in Shelley's case was in substance that when a person by any gift or conveyance took an estate of freehold and in the same gift or conveyance an estate was limited either mediately or immediately to his heirs in fee or in tail, the heirs were words of limitation of the estate and not words of purchase. The rule in Shelley's case was a rule of law and

not a rule of construction, and when a case came within its terms it was applied with all its arbitrary and technical severity. It was held in many cases to apply notwithstanding the will by express terms limited the gift to the first taker to an estate for life, but the enactment of the Revised Statutes not only abolished this rule but it settled in the negative any further claim that a testator's intention to limit a gift or devise to a person for life could not be carried out where a remainder was limited to the heirs or heirs of the body of a person to whom a life estate in the same premises was given. *Webb v. Sweet*, (1907) 187 N. Y. 172, 79 N. E. 1024, affirming 109 App. Div. 911, 95 N. Y. S. 1165. See also *Moore v. Littel*, (1869) 41 N. Y. 66; *Barber v. Cary*, (1854) 11 N. Y. 397; *Spader v. Powers*, (1890) 56 Hun 153, 9 N. Y. S. 39, 30 N. Y. St. Rep. 399.

For an extended note on the rule in *Shelley's Case*, see 29 L. R. A. (N. S.) 963.

Gift for person's benefit.—A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate. *Crain v. Wright*, (1889) 114 N. Y. 307, 21 N. E. 401, affirming 36 Hun 74. But on the other hand, "the law never enlarges an estate by implication." *Olmstead v. Olmstead*, (1850) 4 N. Y. 56.

Futurity annexed to gift.—If futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute and the time of payment only is postponed, the gift is not suspended, but vests at once. *McGillis v. McGillis*, (1898) 154 N. Y. 532, 49 N. E. 145, modifying 11 App. Div. 359, 42 N. Y. S. 921. So, where a life estate was first given to the widow, and by the second clause of the will the testator gave the income arising after her decease to his four daughters during their respective lives, and the remainder to their respective children and their heirs, it was held that the remainder given by the second clause vested upon the death of the testator in the children of the testator's daughters living at that time, subject, however, to open and let in after-born children who might come into existence during the life of the mother. *Monarque v. Monarque*, (1880) 80 N. Y. 320, reversing 19 Hun 332. See also *Surdam v. Cornell*, (1889) 116 N. Y. 305, 22 N. E. 450.

Reversion and vested remainder as meaning the same.—A reversion and a vested remainder in fee simple are, and always have been, convertible terms. *Matter of Hausen*, (1911) 72 Misc. 610, 132 N. Y. S. 257.

Trust with direction to pay to heirs.—Whether a deed of trust creates a present interest in the persons who ultimately are to receive the property, is a matter of construction. *Doctor v. Hughes*, (1916) 174 App. Div. 767, 161 N. Y. S. 634, holding that the grantor's heirs received no vested or contingent interest whatever during the grantor's lifetime, which was descendible, devisable, or alienable, under a deed of trust providing that the grantor should receive a yearly income, subject to variation at the discretion of the trustee; that the trustee might relinquish the trust at any time and reconvey to the grantor; and that on the death of the grantor the trustee should convey the premises, not sold, to the heirs of the grantor, or the balance remaining if a sale of the land had been made. See also *Whittemore v. Equitable Trust Co.*, (1914) 162 App. Div. 607, 147 N. Y. S. 1058.

§ 55. When remainder not limited on contingency defeating precedent estate takes effect. When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect, only on the death of the first taker, or the expiration by lapse of time of such term of years.

This section was derived from Real Property Law of 1896, § 45.

Section 55 of the Real Property Law of 1896 is now covered by section 65.

Definition of remainder: see *supra*, § 38.

Cited.—This section was cited in *Wright v. Clark*, (1913) 81 Misc. 527, 142 N. Y. S. 812.

§ 56. Posthumous children. Where a future estate is limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parents; and a future estate, dependent on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.

This section was derived from Real Property Law of 1896, § 46.

Section 56 of the Real Property Law of 1896 is now covered by section 66.

Child born after making of will: see DECEDENT ESTATE LAW, § 26.

Action by child born after will: see Code Civ. Pro., § 1868.

Compulsory judicial settlement of estate by child born after execution of will: see Code Civ. Pro., § 2727.

Child en ventre sa mere.—It is a well-settled rule of law relative to successions, and to most other cases in relation to infants, that a child en ventre sa mere, as to every purpose where it is for the benefit of the infant, is to be considered in esse. An infant after conception, but before its birth, is in esse for the purpose of taking the remainder or any other estate or interest which is for the benefit of the infant. *Marsellis v. Thalheimer*, (1830) 2 Paige 35; *Mason v. Jones*, (1848) 2 Barb. 229 affirmed (1850) 3 N. Y. 375, 5 How. Pr. 118. But a person who claims property through a child is bound to prove that it was born alive. *Bender v. Terwilliger*, (1900) 48 App. Div. 371, 63 N. Y. S. 269, affirmed without opinion (1901) 166 N. Y. 590, 59 N. E. 1118.

Effect of judgment as to unborn child.—The general rule is that a judgment binds only parties and their privies, but there is a well-recognized exception in a case wherein an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein. In such a case the living owners of the estate for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same represent the whole estate and stand not only for themselves but also for the persons unborn. This exception to the general rule is, however, only applicable when the judgment by which the unborn child is sought to be bound is contested bona fide by some person or persons having a like interest with the children not in esse, and due provision is made for the unborn children by setting apart land or the proceeds of land to represent, in some form, their interests. *Adami v. Gercken*, (1914) 164 App. Div. 472, 150 N. Y. S. 8. See also *Tonele v. Wetmore*, (1909) 195 N. Y. 436, 88 N. E. 1068, reversing 124 App. Div. 686, 109 N. Y. S. 349; *Kent v. St. Michael Church*, (1892) 136 N. Y. 10, 32 N. E. 704, 32 A. S. R. 693, 18 L. R. A. 331; *Monarque v. Monarque*, (1880) 80 N. Y. 329, reversing 19 Hun 332; *Brevoort v. Grace*, (1873) 53 N. Y. 245; *Mead v. Mitchell*, (1858) 17 N. Y. 210, 72 Am. Dec. 455, affirming 5 Abb. Pr. 92; *Russ v. Maxwell*, (1904) 94 App. Div. 107, 87 N. Y. S. 1077. Where a child is en ventre sa mere, an action to set aside an instrument dividing property under the terms of a will should be delayed until the birth of the child, and if born alive it should then be made a party to the action in order to procure a decree which would bind all necessary parties. *Kane v. Odell*, (1916) 171 App. Div. 324, 157 N. Y. S. 308. See also *Fox v. Fee*, (1897) 24 App. Div. 314, 49 N. Y. S. 292.

§ 57. When expectant estates are defeated. An expectant estate can not be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

This section was derived from Real Property Law of 1896, § 47.

Enumeration of estates in expectancy: see *supra*, § 36.

Common-law rule.—It was the common-law rule before the Revised Statutes that a valid executory devise could not be limited after a fee upon the contingency of the nonexecution of an absolute power of disposition vested in the first taker, and such limitation was void, and that an absolute power of disposition annexed to a primary devise in fee was deemed conclusive of the existence in the devisee of an absolute estate. But this arbitrary and technical rule of the common law has been abrogated and the rule now is that though the contingency upon which the creation of the precedent estate is limited to take effect rests in the will or volition of the first taker, the only effect of such limitation is to render the happening of the contingency more remote, but still does not alter the character as a contingency upon the happening of which the estate is to vest. In other words, an expectant estate is saved from being adjudged void in the creation because of its liability to be defeated by something which the party creating the estate provided for or authorized in the creation thereof. *Matter of Westcott*, (1888) 16 N. Y. St. Rep. 286.

Exclusion of power of disposition.—A general power to dispose of property includes the right to dispose of it by will, unless the grant of the power contains words which expressly, or by fair implication, exclude such a method of disposition. *Matter of Gardner*, (1893) 140 N. Y. 122, 35 N. E. 439, affirming 69 Hun 50, 23 N. Y. S. 429. See also *Coleman v. Beach*, (1885) 97 N. Y. 545; *Campbell v. Beaumont*, (1883) 91 N. Y. 464. Where a predominant purpose is apparent in a will, but a doubt arises as to the method devised to effect that purpose, the doubt will be so resolved as to accomplish the purpose, by presuming the testator intended a legal, not an illegal method. *Crozier v. Bray*, (1890) 120 N. Y. 366, 24 N. E. 712, affirmed 39 Hun 121. And a devise of lands with the power of absolute disposal for use of the devise without anything to qualify the words, is a gift in fee simple. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272. See also *Greyston v. Clark*, (1886) 41 Hun 125, 4 N. Y. St. Rep. 4. So, where a limitation over after a devise of a fee simple is void for remoteness or other reason, the fee simple stands as an absolute fee, as though no limitation over had been attempted. *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 Am. Rep. 166. See also *Wells v. Seeley*, (1888) 47 Hun 109, 13 N. Y. St. Rep. 239.

Gift dependent on death.—The rule that where a testamentary gift is to one or more persons, and in case of the death of any of them without issue to the survivors, the death referred to is one in the lifetime of the testator, and that any one of said persons surviving the testator takes absolutely, applies only where the context of the will contains nothing showing a contrary intent. Where the scheme of the will and the context show the testator intended a death occurring at any time this must prevail. *Mead v. Maben*, (1892) 131 N. Y. 255, 30 N. E. 98, reversing 60 Hun 268, 14 N. Y. S. 732. In *Thomas v. Wolford*, (1888) 49 Hun 145, 21 Abb. N. Cas. 231, 1 N. Y. S. 610, there was a devise to the first taker apparently absolute, followed by a devise over to the second taker of the same property, "should there be any left;" and in *Colt v. Heard*, (1877) 10 Hun 189, there was a similar devise to the first taker and a devise over of "such part thereof as he may have at the time of his decease." In both cases it was held that the first devisee took a life estate with a beneficial power of sale and that the second devisee took what was left upon the death of the first. See also *Leggett v. Firth*, (1892) 132 N. Y. 7, 29 N. E. 950; *Moore v. Littel*, (1869) 41 N. Y. 66.

Postponement of right to possession.—Although the right to possession is postponed to a future period and is dependent on the contingency of a death without children, this does not prevent the creation of an estate but renders it liable to be defeated. *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355. See also *Van Aste v. Fisher*, (1889) 117 N. Y. 401, 22 N. E. 943; *Green v. Head*, (1907) 54 Misc. 454, 104 N. Y. S. 383; *Bennett v. Garlock*, (1880) 79 N. Y. 302, 35 Am. Rep. 517, reversing 10 Hun 328.

Application of rule to personal property.—Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property. *Rudd v. Cornell*, (1901) 58 App. Div. 207, 68 N. Y. S. 757, affirmed (1902) 171 N. Y. 114, 63 N. E. 823; *Bell v. Warn*, (1875) 4 Hun 406; *Simpson v. French*, (1888) 6 Dem. 108, 13 N. Y. St. Rep. 759.

Cited.—This section was cited in *Cushman v. Cushman*, (1907) 116 App. Div. 763, 102 N. Y. S. 258, affirmed without opinion (1908) 191 N. Y. 505, 84 N. E. 1112; *Wright v. Clark*, (1913) 81 Misc. 527, 142 N. Y. S. 812; *Matter*

of Wyatt, (1894) 9 Misc. 285, 30 N. Y. S. 275; *Bailey v. Bailey*, (1883) 28 Hun 603, modified by (1884) 97 N. Y. 460.

§ 58. Effect on valid remainders of determination of precedent estate before contingency. A remainder valid in its creation shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterwards happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

This section was derived from Real Property Law of 1896, § 48.

Definition of remainder: see *supra*, § 38.

Common law rule.—It was an inflexible rule of the common law that a remainder must vest at the moment, if not sooner vested, of the determination of the precedent estate, or else it could not vest at all. A remainder created in favor of the heirs of a living person could not vest unless the ancestor died before the happening of the event on which it was to vest, because while he was alive the persons appointed to take the estate as his heirs were unascertained. The uncertainty of his dying before the time should arrive or event should happen on which the remainder was to vest was, therefore, the very contingency which characterized the estate as a contingent remainder. Such estates were thus liable to be defeated by circumstances arising subsequently to their creation, but the validity of the limitation was never questioned. *Campbell v. Rawdon*, (1858) 18 N. Y. 412, reversing 19 Barb. 494.

Void intermediate trust.—Where a will gave the testator's widow a valid life estate, a subsequent clause providing for the void trust may be expunged without destroying the will as a whole or creating partial intestacy, when the void trust is succeeded by a valid ultimate trust and good remainders in favor of the same legatees for whose benefit the void intermediate trust is created and under which they take the same proportions. *Kalish v. Kalish*, (1901) 166 N. Y. 368, 59 N. E. 917, affirming 45 App. Div. 528, 61 N. Y. S. 448.

Cited.—This section was cited in *Matter of Lincoln Trust Co.*, (1912) 76 Misc. 421, 137 N. Y. S. 162; *In re McQueen's Will*, (1917) 163 N. Y. S. 287.

§ 59. Qualities of expectant estates. An expectant estate is descendible, devisable and alienable, in the same manner as an estate in possession.

This section was derived from Real Property Law of 1896, § 49.

Estates in expectancy: see *supra*, § 35.

Enumeration of estates in expectancy: see *supra*, § 36.

Definition of future estates: see *supra*, § 37.

When expectant estates are deemed created: see *infra*, § 64.

Validity of transfers of expectancies to strangers: see *Ann. Cas.* 1916E 1241 note.

Effect of assignor's predecease of ancestor: see *L. R. A.* 1917C 267 note.

Words sufficient to convey expectant estates.—The usual words of grant, conveyance, or release, are sufficient to pass the estates mentioned in this section. *Miller v. Emans*, (1850) 19 N. Y. 384.

Application to remainders. A remainder which is vested or contingent in interest may be transferred both at law and in equity. *Bergmann v. Lord*, (1909) 194 N. Y. 70, 86 N. E. 828, affirming 122 App. Div. 921, 107 N. Y. S. 1121; *Rothschild v. Schiff*, (1907) 188 N. Y. 327, 80 N. E. 1030, modifying 103 App. Div. 235, 92 N. Y. S. 1076; *Baltes v. Union Trust Co.*, (1904) 180 N. Y. 183, 72 N. E. 1005, affirming 74 App. Div. 630, 77 N. Y. S. 1121; *Sayles v. Best*, (1893) 140 N. Y. 368, 35 N. E. 636; *Griffin v. Shepard*, (1891) 124 N. Y. 70, 26 N. E. 339, affirming 40 Hun 355; *Matter of Dodge*, (1887) 105 N. Y. 585, 12 N. E. 759, reversing 40 Hun 443; *Crooke v. Kings County*,

(1884) 97 N. Y. 421; *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201, modifying and affirming 30 Hun 605; *Hennessy v. Patterson*, (1881) 85 N. Y. 91; *Ham v. Van Orden*, (1881) 84 N. Y. 257; *Stevenson v. Lesley*, (1877) 70 N. Y. 512, modifying 9 Hun 637; *Brevoort v. Grace*, (1873) 53 N. Y. 245; *Moore v. Littell*, (1869) 41 N. Y. 66; *Hills v. Flynn*, (1914) 161 App. Div. 127, 146 N. Y. S. 508; *Stringer v. Barker*, (1905) 110 App. Div. 37, 96 N. Y. S. 1052, modified on other grounds (1908) 191 N. Y. 157, 83 N. E. 690; *New York Security, etc., Co. v. Schoenberg*, (1903) 87 App. Div. 262, 84 N. Y. S. 359, affirmed without opinion (1904) 177 N. Y. 556, 69 N. E. 1128; *Lewis v. Howe*, (1901) 64 App. Div. 572, 72 N. Y. S. 851, affirmed (1903) 174 N. Y. 340; *Lingsweiler v. Hart*, (1896) 10 App. Div. 156, 41 N. Y. S. 862, affirmed without opinion (1899) 159 N. Y. 543, 54 N. E. 1093; *Tredwell v. Tredwell*, (1914) 86 Misc. 104, 148 N. Y. S. 391; *Clark v. Trosh*, (1912) 81 Misc. 407, 142 N. Y. S. 966; *Green v. Head*, (1907) 54 Misc. 454, 104 N. Y. S. 383; *Pickert v. Windecker*, (1893) 73 Hun 476, 26 N. Y. S. 437; *Ramsey v. De Remer*, (1892) 65 Hun 212, 20 N. Y. S. 143; *Smiley v. Bailey*, (1870) 59 Barb. 80; *Savage v. Pike*, (1866) 45 Barb. 464; *Leslie v. Marshall*, (1860) 31 Barb. 560; *Eells v. Lynch*, (1861) 8 Bosw. 465; *Laurence v. Bayard*, (1838) 7 Paige 70.

Control over expectant estate.—The person in whom an expectant estate is vested has the same control over the interest which he thus possesses as though he were in actual possession of the property representing the estate. He may deal with it in precisely the same manner. *New York Life Ins., etc., Co. v. Cary*, (1908) 191 N. Y. 33, 83 N. E. 598, reversing 120 App. Div. 264, 105 N. Y. S. 125. See also *Paget v. Melcher*, (1898) 156 N. Y. 399, 51 N. E. 24, reversing 26 App. Div. 12, 49 N. Y. S. 922; *Livingston v. New York Life Ins., etc., Co.*, (1891) 59 Hun 622, 13 N. Y. S. 105, 36 N. Y. St. Rep. 566.

Sale of contingent remainder to satisfy judgment.—A contingent remainder in a trust estate may be sold to satisfy a judgment against the remainderman. *Cohalan v. Parker*, (1910) 138 App. Div. 849, 123 N. Y. S. 343; *Higgins v. Downs*, (1905) 101 App. Div. 119, 91 N. Y. S. 937.

Vesting in trustee in bankruptcy.—Future contingent interests in personal property are alienable, the same as contingent remainders in real property, and such an interest passes to a trustee in bankruptcy. *Clowe v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284, affirming 151 App. Div. 912, 135 N. Y. S. 1105.

Husband's interest under tenancy by entirety.—It has been held that a husband's contingent interest in a tenancy by the entirety, dependent upon his surviving his wife, may be sold under a judgment procured against him. *Beach v. Hollister*, (1875) 3 Hun 519.

Contingent property rights under ante-nuptial agreement.—It has been held that were at the time when an ante-nuptial agreement was made, and also when the marriage itself was solemnized, neither of the parties had any right, title or interest whatever to or in the property, there was accordingly in the husband no expectant estate in it, as such estates have been defined by the statute, and no interest which by its provisions were made descendible, devisable or alienable. *Johnston v. Spicer*, (1886) 41 Hun 475, 5 N. Y. St. Rep. 40.

Defeat of expectant estate by power of sale.—This section does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a power of sale given to trustees, which must be exercised before the owner of the expectant estate becomes vested with the absolute title. *Bascom v. Weed*, (1907) 53 Misc. 496, 105 N. Y. S. 459.

Reverter on breach of condition subsequent.—The possibility of reverter, by the exercise of the right of re-entry, on the happening of a breach of a condition subsequent, annexed to a grant in fee, requiring a re-entry in order to re-vest the former estate, is not descendible or devisable, either at common law or under the statutes; but on the death of the grantor before re-entry it devolves upon his heirs at law by force of representation and not by descent. *U'pington v. Corrigan*, (1896) 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, affirming 79 Hun 488, 29 N. Y. S. 1002. See also *Van Ronsseelaar v. Ball*, (1859) 19 N. Y. 100, affirming 27 Barb. 104; *Nicoll v. New York, etc., R. Co.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460.

Conveyance of life estate with remainder to same person.—A conveyance of lands to E. for life, with a proviso that all the estate terminate during the lifetime of E. the remainder is to go to N. for the residue of E.'s life, and

further providing that on the death of E. the remainder shall go to him and his heirs, vests E. with both the life estate and the remainder; and the grantee becomes seized of the remainder on the delivery of the deed, his estate commencing in praesenti, though to come into possession in futuro, and the remainder by virtue of this section passes by the will or deed of the grantee. *Ray v. Jaeger*, (1909) 131 App. Div. 294, 115 N. Y. S. 737.

Future contingent interest in personalty.—A future contingent interest in personal property is alienable the same as a contingent remainder in realty. *National Park Bank v. Billings*, (1911) 144 App. Div. 536, 129 N. Y. S. 846, affirmed without opinion (1911) 203 N. Y. 556, 96 N. E. 1122; *Lauter v. Hirsch*, (1910) 67 Misc. 165, 121 N. Y. S. 651.

Mere possibility of interest.—It has been held that “the language of the statute declaring expectant estates to be descendible, devisable, and alienable is comprehensive, but that it still leaves open for determination the question as to what are expectant estates and what interests are descendible, devisable, and alienable,” and that mere anticipations and hopes, when not coupled with a legal interest, are not deemed to be “expectant estates.” *Robinson v. New York Life Ins., etc., Co.*, (1911) 75 Misc. 361, 133 N. Y. 257. See also *Edwards v. Varick*, (1846) 5 Denio 664; *Ward v. Ward*, (1904) 131 Fed. 946, affirmed 145 Fed. 1023 mem., 74 C. C. A. 146.

Cited.—This section was cited in *Heise v. Wells*, (1914) 211 N. Y. 1, 104 N. E. 1120, affirming 150 App. Div. 928, 135 N. Y. S. 1117.

§ 60. Disposition of rents and profits. A disposition of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this article for future estates in real property.

This section was derived from Real Property Law of 1896, § 50.

Undisposed profits: see *infra*, § 63.

Directions for accumulation of personal property: see PERSONAL PROPERTY LAW, § 16.

Devise or assignment of rent.—A devise or assignment of rent gives to the devisee, or assignee, an equitable interest in the rent, and the right to equitable remedies for its recovery. *Van Rensselaer v. Read*, (1863) 26 N. Y. 558. See also *Van Rensselaer v. Hays*, (1859) 19 N. Y. 68, 75 Am. Dec. 278, affirming 27 Barb. 104.

§ 61. Accumulations. All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons may be directed by any will or deed sufficient to pass real property, as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries and shall terminate at or before the expiration of such minority.

3. If in either case, hereinbefore provided for, such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority.

Provided, that the income arising from any real property granted, conveyed, or devised in trust to any incorporated college or other incorporated literary institution for any of the purposes specified in section one hundred and fourteen of this chapter, or for the purposes of providing for the support of any teacher in a grammar school or institute, may be permitted to accumulate until the same shall amount to a sum sufficient, in the opinion of the regents of the university, to carry into effect any of the charitable uses and trusts mentioned either in section one hundred and fourteen of this chapter or in this paragraph of this section.

Provided, if any of the principal of any trust fund actually received by any incorporated college or other incorporated literary institution, or by the corporation of any city or village, or by the commissioners of common schools of any town, or by the trustees of any school district, under any grant, conveyance, or devise, for any of the purposes for which trusts are authorized under section one hundred and fourteen of this chapter, shall subsequently become diminished from any cause, such diminution may be made up by the accumulation of the interest or income of the principal of such trust fund, in accordance with the directions, if any contained in the grant, conveyance or devise of any such trust fund; and if no directions for that purpose are contained in such grant, conveyance or devise, then such diminution may be made up in whole or in part by such accumulation, in the discretion of the trustees of such trust fund; but in no case shall such accumulation be allowed to increase the trust fund, beyond the true amount or value thereof, actually received by the trustees, to be estimated after the deduction of all liens and incumbrances on such trust fund, and of all expenses incurred or paid by the trustees in the collection or obtaining the possession of the same.

Provided further, that where a gift, grant, devise or bequest of real and personal property, or of real property alone, is made in trust by the owner thereof to a religious, educational, charitable or benevolent corporation, for any of the purposes specified or comprehended in its charter, not more than one-fourth of the total value of such gift, grant, devise or bequest of real and personal property, or of real property alone, not exceeding in value the sum of fifty thousand dollars, may be set apart for the accumulation of the rents and profits, and income, of such property, for the benefit of such corporation, until such time as such accumulation shall amount to the sum of one hundred thousand dollars, whereupon such accumulation shall be available for the use of such corporation, as a part of the permanent endowment fund

thereof, or otherwise as provided in the conditions of the gift, grant, devise or bequest to such corporation.

This section, to the end of subdivision 3, was derived from the Real Property Law of 1896, § 51; the first proviso was derived from L. 1846, ch. 74, § 1; the second proviso came from L. 1855, ch. 432, § 1. The section was amended by L. 1915, ch. 670, § 1. This amendment added the third proviso.

Validity of directions for accumulation of personal property: see PERSONAL PROPERTY LAW, § 16.

Advancements of real and personal estates: DECEDENT ESTATE LAW, §§ 96, 97, 99.

Unlawful accumulation of rents and income.—In *Kalish v. Kalish*, (1901) 166 N. Y. 368, 59 N. E. 917, affirming 45 App. Div. 528, 61 N. Y. S. 448, a testamentary direction that upon the death of a life tenant the executors shall hold the property in trust with the power to collect the rents, issues and profits, and after the payment of taxes, charges, and specified annuities, shall invest the surplus in real estate, and that the estate shall not be settled for a period of five years after the death of the life tenant, final settlement to be made as soon thereafter as in the opinion of the executors will be for its best interests, was held void as contravening the statutes against perpetuities, since the indefinite period named for the continuance of the trust might exceed two lives in being. The disposition was void also as violating the statute against unlawful accumulations of rents and income where the beneficiaries were of full age.

Limitation of section as to infants.—The only directions for the accumulation of rents and profits of real property allowed by subdivisions 1 and 2 of this section are those for the benefit of infants in being at the creation of the estate out of which the rents and profits are to arise. *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808. See also *Thorn v. De Breteuil*, (1904) 179 N. Y. 64, 71 N. E. 470, modifying 86 App. Div. 405, 83 N. Y. S. 849; *Pray v. Hegeman*, (1883) 92 N. Y. 508, reversing 27 Hun 603; *McGuire v. McGuire*, (1903) 80 App. Div. 63, 80 N. Y. S. 497; *Spencer v. Spencer*, (1899) 38 App. Div. 403, 56 N. Y. S. 460; *Matter of Raab*, (1913) 79 Misc. 185, 139 N. Y. S. 869; *Matter of Van Doren*, (1912) 77 Misc. 44, 137 N. Y. S. 420; *Tobin v. Graf*, (1902) 39 Misc. 412, 80 N. Y. S. 5; *Matter of Snyder*, (1901) 35 Misc. 588, 72 N. Y. S. 61; *Brandt v. Brandt*, (1895) 13 Misc. 431, 34 N. Y. S. 684; *Matter of Hoyt*, (1893) 71 Hun 13, 24 N. Y. S. 577; *Gilman v. Healy*, (1881) 1 Dem. 404. Thus, "the accumulation must not only be for infants, but it must be exclusively for infants, so much so that if an adult or person not in being is to share in the accumulation, then a trust for the accumulation is void." *Matter of Rogers*, (1897) 22 App. Div. 428, 48 N. Y. S. 175, affirmed (1899) 161 N. Y. 108, 55 N. E. 393. See also *Matter of Ziegler*, (1913) 82 Misc. 10, 143 N. Y. S. 682; *Hawley v. James*, (1836) 16 Wend. 61; *Boynton v. Hoyt*, (1845) 1 Denio 53. So, a direction that the income shall be accumulated is valid for the minority of the beneficiary, and is void as to the time beyond such minority. *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58; *Matter of O'Reilly*, (1908) 59 Misc. 136, 112 N. Y. S. 208; *Cochrane v. Alexandre*, (1907) 56 Misc. 212, 107 N. Y. S. 587; *Dresser v. Travis*, (1902) 39 Misc. 358, 79 N. Y. S. 924; *Horndorf v. Horndorf*, (1895) 13 Misc. 343, 34 N. Y. S. 560; *Richardson v. Hunt*, (1891) 59 Hun 627, 14 N. Y. S. 48, 38 N. Y. St. Rep. 274; *Draper v. Palmer*, (1889) 54 Hun 637, 7 N. Y. S. 614; *Matter of Hayden*, (1894) 77 Hun 219, 28 N. Y. S. 357. See also *Tweedell v. New York Life Ins., etc., Co.*, (1894) 82 Hun 602, 31 N. Y. S. 764; *Hunter v. Hunter*, (1853) 17 Barb. 25; *King v. Rundle*, (1853) 15 Barb. 139; *Converse v. Kellog*, (1850) 7 Barb. 590; *Robison v. Robison*, (1871) 5 Lans. 165; *Simpson v. English*, (1873) 4 Thomp. & C. 80; *Allen v. Allen*, (1887) 11 N. Y. St. Rep. 561. And the law forbids an accumulation of either rents, profits or income, except in the manner and for the period of time specified in the statutes. *Matter of Nesmith*, (1894) 140 N. Y. 609, 35 N. E. 942; *Livingston v. Tucker*, (1887) 107 N. Y. 549, 14 N. E. 443; *Penniman v. Howard*, (1911) 71 Misc. 598, 128 N. Y. S. 910.

Accumulation for benefit of unborn child.—While an accumulation for the benefit of an unborn child, which commences after its birth and terminates

during its minority, is lawful, the statute does not permit an accumulation for the benefit of an unborn child where the accumulation is to commence before its birth. *United States Trust Co. v. Soher*, (1904) 178 N. Y. 442, 70 N. E. 970, affirming 88 App. Div. 506, 85 N. Y. S. 266; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Kilpatrick v. Johnson*, (1857) 15 N. Y. 322; *Haxtun v. Corse*, (1848) 2 Barb. Ch. 506. See also *Cook v. Lowry*, (1884) 95 N. Y. 103; *Gott v. Cook*, (1839) 7 Paige 521, affirmed 24 Wend. 641, 35 Am. Dec. 641. And although the period of gestation, or the time for a posthumous child to be born, added to its father's life, may, by possibility, be a longer term than any two specified lives, yet when the beneficiary, under a trust for such an accumulation, happens to be *en ventre sa mere*, at the death of the father, the time that may elapse previous to the birth of such beneficiary should be disregarded. *Mason v. Jones*, (1848) 2 Barb. 229, affirmed (1850) 3 N. Y. 375.

Effect of minor's death.—The provision for accumulation becomes inoperative as to the share of a deceased minor child upon his death, as an accumulation is only permitted for the benefit of living objects. *Goebel v. Wolf*, (1889) 113 N. Y. 405, 21 N. E. 388, 10 A. S. R. 464. And when a minor dies, for whose benefit accumulations of income have been directed, it is competent for the testator to dispose of them in the same manner as any other portion of his estate, provided they have not vested in the infant as paid in. *Smith v. Parsons*, (1895) 146 N. Y. 116, 40 N. E. 736; *Matter of Ziegler*, (1913) 8^c Misc. 10, 143 N. Y. 682.

Time limit for future accumulations.—The time allowed, by statute, for an accumulation of rents and profits to commence in future, is the same as is allowed for a future estate in lands to vest in possession, viz., two lives in being. *Mason v. Jones*, (1848) 2 Barb. 229, affirmed (1850) 3 N. Y. 375. A testator may, in the creation of a trust, suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being, and with the limitation during that period he may provide for the distribution of the annual income among as many persons and for as many successive lives as he sees fit. *Schernerhorn v. Cotting*, (1892) 131 N. Y. 48, 29 N. E. 980. A trust to apply rents to the use of more than two beneficiaries is valid, if it is limited in its duration to the life of one of them. *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348.

Accumulation for period not measured by lives.—An accumulation for an absolute and definite fixed period, or for an indefinite period not measured by human lives in being, is in violation of the statute. *Wells v. Wells*, (1892) 30 Alb. N. Cas. 225, 24 N. Y. S. 874.

Designation of beneficiaries.—A trust to receive the rents and profits of real estate and apply them to the use of the issue of a testator's infant children for a period not exceeding two lives in being is not void because the beneficiaries are not ascertained. *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492.

Implied accumulations.—Implied accumulations are as much forbidden as express ones. *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Vail v. Vail*, (1834) 4 Paige 317. And a construction which would impute an intention to direct an unlawful accumulation should be avoided if possible. *Hill v. Guaranty Trust Co.*, (1914) 163 App. Div. 374, 148 N. Y. S. 601. See also *Matter of Hoyt*, (1906) 116 App. Div. 217, 101 N. Y. S. 557, affirmed without opinion, (1907) 189 N. Y. 511, 81 N. E. 1166; *Hendricks v. Hendricks*, (1896) 3 App. Div. 604, 38 N. Y. S. 402, affirmed without opinion (1897) 154 N. Y. 751, 49 N. E. 1098. But where a will devised and bequeathed the residue of testator's estate to his executors in trust, among other things, to pay a portion thereof to certain children, to be equally divided between them, share and share alike, upon their arriving at the age of twenty-one years, making no provision as to the disposition of the income in the meantime, it was held that it was the duty of the trustees to collect the rents and profits, and, therefore, there was an implied direction for accumulation which was valid under the statute, and that the beneficiaries were not entitled to any part of such rents or profits until they came of age. *Matter of Fritts*, (1897) 19 Misc. 402, 44 N. Y. S. 344.

Anticipation of accumulation.—Those who presumptively will be entitled to receive the rents and profits when the period of accumulation ends, are entitled to anticipate the event which is to terminate the accumulation and

to take at once the rents and profits which are undisposed of or unlawfully directed to be accumulated. *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348. See also *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Pray v. Hegman*, (1883) 92 N. Y. 508, reversing 27 Hun 603; *Keyser v. Mead*, (1907) 53 Misc. 114, 103 N. Y. S. 1091; *Potter v. McAlpine*, (1885) 4 Dem. 108.

Trust to use rents and profits to pay mortgages.—The application of part of the income of a trust estate to the payment of mortgages thereon, thereby increasing the capital of the estate by decreasing the burden thereon, has been held to be an invalid accumulation within the meaning of the section, notwithstanding such accumulation took the form of an extinguishment of indebtedness, and was limited to the surplus income remaining after the payment of an annuity and restricted to the lifetime of the annuitant. *Haskell v. King*, (1900) 162 N. Y. 134, 56 N. E. 515, 76 A. S. R. 302, modifying 28 App. Div. 280, 51 N. Y. S. 73; *Herzig v. Herzig*, (1910) 140 App. Div. 514, 125 N. Y. S. 402. See also *Graham v. Ackerly*, (1907) 120 App. Div. 430, 105 N. Y. S. 51; *Matter of Snyder*, (1901) 35 Misc. 588, 72 N. Y. S. 61; *Matter of Fisher*, (1893) 4 Misc. 46, 25 N. Y. S. 79; *Cowen v. Rinolds*, (1894) 82 Hun 479, 31 N. Y. S. 554; *Killam v. Allen*, (1868) 52 Barb. 605. And a trust directing the trustees to apply the surplus income to the payment of mortgages upon a testator's real estate constitutes an unlawful accumulation. *Kirk v. McCann*, (1907) 117 App. Div. 56, 101 N. Y. S. 1093.

Discretionary power to trustees.—A discretionary power given to trustees to make disbursement of income in the course of management of the trust property, if restricted to such matters as tend to preserve it, or to make it efficient for earning purposes, has been held not to be a violation of the section. *Matter of NeSmith*, (1894) 140 N. Y. 609, 35 N. E. 942. See also *Garvey v. MacDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457; *Matter of Arensberg*, (1907) 120 App. Div. 463, 104 N. Y. S. 1033. And where a will gave a portion of a testator's residuary estate to his executors in trust to receive and apply the income to the use of the plaintiff during his life, and by a codicil the executors were directed, if in their judgment the whole of the income was not required for plaintiff's support, to retain and invest the residue during minority, the accumulations to be considered as part of the principal, it was held that the direction for accumulation was void and that the plaintiff was entitled to the whole income. *Barbour v. De Forest*, (1884) 95 N. Y. 13, reversing 28 Hun 15.

Direction to carry on testator's business.—A direction to executors and trustees to carry on the testator's business for a period of lives, and after deducting the amount to be paid for support and maintenance of children until each should attain the age of twenty-five, then to add the amount of profits to the capital of the estate, was held to be in contradiction of the section, in so far as it directed an accumulation after the children attained their majority. *Thorn v. De Breteuil*, (1904) 179 N. Y. 64, 71 N. E. 470, modifying 86 App. Div. 405, 83 N. Y. S. 849.

Application of section to personal property.—The regulation of accumulation of the income of personal property is substantially the same as that relating to the accumulation of the rents and profits of land. *Barbour v. De Forest*, (1884) 95 N. Y. 13, reversing 28 Hun 615; *Matter of Phillips*, (1907) 56 Misc. 96, 107 N. Y. S. 388; *Garland v. Garland*, (1901) 35 Misc. 147, 71 N. Y. S. 465; *Matter of Dey Ermand*, (1881) 24 Hun 1.

Cardinal principle of testamentary construction.—If, in construing a will, a general scheme can be found to have been intended which may be declared valid, it is the duty of the court to effectuate the main purpose of the testator; so, where a clause is susceptible of two constructions, one of which will render it valid and the other invalid, the former should be adopted. *Roe v. Vingut*, (1889) 117 N. Y. 204, 22 N. E. 933. See also *Lovett v. Gillender*, (1866) 35 N. Y. 617, affirming 44 Barb. 560; *Matter of Keogh*, (1906) 112 App. Div. 414, 98 N. Y. S. 433, affirmed without opinion (1906) 186 N. Y. 544, 79 N. E. 1109; *Arthur v. Arthur*, (1896) 3 App. Div. 375, 38 N. Y. S. 1002; *Matter of Raab*, (1913) 79 Misc. 185, 139 N. Y. S. 869; *Matter of Phillips*, (1907) 56 Misc. 96, 107 N. Y. S. 388; *McGrath v. Van Stavoren*, (1880) 8 Daly 454. And a trust otherwise lawfully constituted is not invalidated because of an unlawful direction for accumulation, and the limitations of an estate not depending upon the unlawful accumulations are unaffected. *Cochrane v.*

Schedl, (1894) 140 N. Y. 516, 35 N. E. 971, affirming 64 Hun 576, 19 N. Y. S. 424. See also Dodge v. Pond, (1861) 23 N. Y. 69, modifying 28 Barb. 121; Williams v. Williams, (1853) 8 N. Y. 525. But, where the material provisions of a will are illegal and cannot be separated from the rest, without defeating its general scheme, the whole is void, and the property must be disposed of as in the case of an intestacy. Harris v. Clark, (1852) 7 N. Y. 242. See also Kelley v. Hogan, (1902) 71 App. Div. 343, 76 N. Y. S. 5; Endress v. Willey, (1906) 52 Misc. 388, 102 N. Y. S. 71.

§ 62. Anticipation of directed accumulation. Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

This section was derived from Real Property Law of 1896, § 52.

Anticipation of directed accumulation of personal property: see PERSONAL PROPERTY LAW, § 17.

Power of court in absence of statute.—It has been held that even in the absence of any statute authorizing an allowance from the corpus or income of the estate for the education, maintenance, and support of the infant legatees, a court of equity would have undoubted power, and, in a proper case made, would exercise that power in their behalf, by directing an allowance for their benefit. Matter of Howland, (1902) 37 Misc. 114, 74 N. Y. S. 950, reversed on other grounds 75 App. Div. 207.

Anticipation where rents and profits are directed to be accumulated.—Even where the rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and they are destitute of other sufficient means of support and education, the court has power to direct a suitable sum out of the rents and profits to be applied to their maintenance and education. Gladding v. Follett, (1883) 2 Dem. 58, affirmed 30 Hun 219, affirmed (1884) 95 N. Y. 652; Matter of Wagner, (1903) 81 App. Div. 163, 80 N. Y. S. 785. And where there is a direction for an accumulation of the rents and profits by implication, for the benefit of an infant who is entitled to the expectant estate and is destitute of other sufficient means of support and education, the case is brought within the provisions of the section, and a Surrogate's Court has power to direct the trustee to pay to the general guardian a suitable sum out of such rents and profits, to be applied to the maintenance and education of the infant. Matter of Fritts, (1897) 19 Misc. 462, 44 N. Y. S. 344.

Application of rents for infant's use.—A testamentary scheme may provide that a part of the rents may be applied to the use of an infant instead of accumulated. Roe v. Vingt, (1889) 117 N. Y. 204, 22 N. E. 933; Hayden v. Sugden, (1905) 48 Misc. 108, 96 N. Y. S. 681.

Allowance out of fund given to several infants as a class.—The utmost extent to which the court is authorized to go in allowing maintenance out of a fund which may never come to the infant, is to allow it out of an estate which is given absolutely to a class of infants with benefit of survivorship. In such cases, as the chance of survivorship is equal although all may not in the end become sharers in the fund, the court has gone so far as to allow maintenance out of the fund for the benefit of all the beneficiaries so long as all of them remained minors. Matter of Davison, (1836) 6 Paige 56.

Power to apply principal.—An express trust to receive and apply or receive and accumulate rents may be coupled with a power to apply the principal to the use of the beneficiary. This latter is not a trust, for no express trust is authorized for that purpose. But as a power it is valid. Such a feature does not interfere with the vesting of the remainder limited on the trust, but merely renders it defeasible. Hayden v. Sugden, (1905) 48 Misc. 108, 96

N. Y. S. 681. See also *Van Axte v. Fisher*, (1889) 117 N. Y. 401, 22 N. E. 943. And provision for payment of part of the income during minority may be coupled with a provision to pay over all the income for life upon reaching majority. *Horton v. Cantwell*, (1888) 108 N. Y. 255, 15 N. E. 546.

Practice.—To entitle a father to an inquiry in regard to the propriety of making him an allowance for the support and maintenance of an infant, he should state a special case showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infants, which created an equitable claim in his favor. *Smith v. Geortner*, (1870) 40 How. Pr. 185. See also *Matter of Bostwick*, (1819) 4 Johns. Ch. 100.

§ 63. Undisposed profits. When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate. But any and all persons who legally shall have begun heretofore, or shall begin hereafter, to receive any such undisposed of rents and profits or any part thereof by virtue of this section or otherwise, shall continue to receive and enjoy the same notwithstanding the birth thereafter of a child or children to any person or persons receiving all or any part of such rents and profits.

This section was derived from Real Property Law of 1896, § 53. It was amended by L. 1916, ch. 364. This amendment added the last sentence to the section.

Suspension of power of alienation: see *supra*, § 42.

Disposition of rents and profits: see *supra*, § 60.

Interest remaining in grantor of express trust: see *infra*, § 102.

Suspension of ownership of personal property: see PERSONAL PROPERTY LAW, § 11.

When income of trust fund is not alienable: see PERSONAL PROPERTY LAW, § 15.

What is "next eventual estate."—By the expression "next eventual estate" is meant "the estate which is to take effect upon the happening of the event which terminates the accumulation." *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348. See also *Young v. Barker*, (1910) 141 App. Div. 801, 127 N. Y. S. 211; *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58; *Tredwell v. Tredwell*, (1914) 86 Misc. 104, 148 N. Y. S. 391.

Persons entitled to "next eventual estate."—The persons entitled "to the next eventual estate" are the persons entitled to the estate at the end of the period of accumulation. *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Matter of Ryder*, (1904) 43 Misc. 476, 89 N. Y. S. 460. See also *Bloodgood v. Lewis*, (1913) 209 N. Y. 95, 102 N. E. 610, reversing 146 App. Div. 86, 130 N. Y. S. 621, and modifying 151 App. Div. 941, 136 N. Y. S. 1131; *United States Trust Co. v. Soher*, (1904) 178 N. Y. 442, 70 N. E. 970, affirming 88 App. Div. 506, 85 N. Y. S. 266; *Matter of Tompkins*, (1898) 154 N. Y. 634, 49 N. E. 135, modifying 10 App. Div. 572, 42 N. Y. S. 412; *Matter of Crossman*, (1889) 113 N. Y. 503, 21 N. E. 180; *Embury v. Sheldon*, (1877) 63 N. Y. 327; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Schettler v. Smith*, (1869) 41 N. Y. 328; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Levi v. Scheel*, (1908) 124 App. Div. 613, 100 N. Y. S. 182; *Benedict v. Dunning*, (1905) 110 App. Div. 303, 97 N. Y. S. 259; *Reeves v. Snook*, (1903) 86 App. Div. 303, 83 N. Y. S. 746; *Meldohn v. Devlin*, (1898) 31 App. Div. 146, 53 N. Y. S. 172, affirmed without

opinion (1901) 167 N. Y. 573, 60 N. E. 1116; *Garvey v. Union Trust Co.*, (1898) 29 App. Div. 513, 52 N. Y. S. 260; *Breen v. Conway*, (1911) 135 N. Y. S. 140; *Matter of Kohler*, (1916) 96 Misc. 433, 160 N. Y. S. 669; *Matter of Van Doren*, (1912) 77 Misc. 44, 137 N. Y. S. 420; *Matter of Hazelton*, (1912) 77 Misc. 419, 137 N. Y. S. 937; *Ransom v. Ransom*, (1910) 70 Misc. 30, 127 N. Y. S. 1027, reversed on other grounds 147 App. Div. 835; *Matter of O'Reilly*, (1908) 59 Misc. 136, 112 N. Y. S. 208; *Koch v. Semken*, (1908) 58 Misc. 90, 108 N. Y. S. 771; *Cochrane v. Alexandre*, (1907) 56 Misc. 212, 107 N. Y. S. 587; *Central Trust Co. v. Eggleston*, (1905) 47 Misc. 475, 95 N. Y. S. 945, affirmed 110 App. Div. 893, reversed on other grounds (1906) 185 N. Y. 23; *Matter of Bender*, (1904) 44 Misc. 79, 89 N. Y. S. 731; *Olcott v. Ossowski*, (1901) 34 Misc. 376, 69 N. Y. S. 917; *Gould v. Rutherford*, (1894) 79 Hun 280, 29 N. Y. S. 362; *Crossman v. Crossman*, (1887) 6 Dem. 148. And the statute refers to those who are presumptively entitled at the time the income accrues, even though the corpus of the estate, by reason of subsequent events, may eventually rest elsewhere. *Matter of Kohler*, (1916) 96 Misc. 433, 160 N. Y. S. 669. Thus, where a testator directed that during minority a certain fixed sum should be applied out of the rents, profits and income of the share of the son, for his education and maintenance, and on his majority he gave the whole income to the son for life, it was held that this should be treated as creating an equitable expectant life interest or estate in the son, in the share devised to his use, from and after his arrival at majority, and as constituting the next eventual estate within the section, in the property out of which the income arose. *Pray v. Hegeman*, (1883) 92 N. Y. 508, reversing 27 Hun 603. Where a testator in case of his decease leaving a surviving child, not of full age, devised all his real estate to trustees, in trust, to pay the net income from the rents and profits to his widow, until all of his living children should arrive at full age, and upon their arrival at full age, directed that the trust should cease; and thereupon devised to his widow a life estate in certain premises, remainder to a son, and disposed of the residue of the realty by various specific devises to his children, it was held that the trust was for the life of the widow, and terminable in any event at her death, and subject to be determined by the arrival, during her life, of all the testator's living children at full age; and that the trust so created was valid and effectual. *Provost v. Provost*, (1877) 70 N. Y. 141, affirming 7 Hun 81. Where the income of a trust fund for the care, maintenance and education of a testator's daughter was directed to be paid to her during her minority or so long as she remained under the control of the executrix and trustee in such sums as she should deem proper, and upon the daughter's reaching majority the executrix and trustee was directed to account to the daughter for all of the estate and thereafter to pay over to her, quarterly, the entire income, it was held that the daughter was entitled to the income which accrued during her minority and which had not been applied. *Matter of May*, (1912) 76 Misc. 103, 136 N. Y. S. 335.

Effect of residuary clause.—A residuary clause does not necessarily dispose of the rents and income within the meaning of the section. If trust funds are fixed amounts, all the accumulations thereof would not pass into the residuary estate, on the ground that the residuary clause amounted to a disposition of the rents and profits within the meaning of the section. The statutory provision refers to a specific disposition of rents and profits, to take effect pending the vesting in possession of an expectant estate. In every case where there is a fixed specific trust fund and an expectant estate created therein, the residuary clause would operate to prevent the holder of the next eventual estate from taking the income. Then in no case where the rents, pending the vesting in possession of the expectant estate, are disposed of could the holder of an expectant estate be entitled to such rents so long as a residuary clause could be found in the will. *Matter of Kohler*, (1916) 96 Misc. 433, 160 N. Y. S. 669.

Effect of delivery of deed in escrow.—An intended grantee, while the deed to him is held as an escrow, has no expectant estate which gives him a right to the intermediate rents and profits, under the section, as there can be no valid existing limitation of an estate, under an escrow, until it has become effective by the eventual delivery. *Hunter v. Hunter*, (1853) 17 Barb. 25.

Effect of void trust for accumulating interest on gift of principal.—A void trust for the accumulation of the interest of money, does not invalidate the

gift of the principal, and the provision of the section has declared the sense of the legislature to the same effect. *Kilpatrick v. Johnson*, (1857) 15 N. Y. 322; *Robison v. Robison*, (1871) 5 Lans. 165. And where the direction for an accumulation is void, and there is some other and legal disposition of the rents and profits, the statute does not apply and in such case the direction for accumulation should be eliminated from the will. *Matter of Hoyt*, (1906) 116 App. Div. 217, 101 N. Y. S. 557, affirmed without opinion (1907) 189 N. Y. 511, 81 N. E. 1166. See also *Penniman v. Howard*, (1911) 71 Misc. 598, 128 N. Y. S. 910.

Application of section to personal property.—The rule laid down by the section is equally applicable to future interests in personal property. *Matter of Harteau*, (1912) 204 N. Y. 292, 97 N. E. 726, modifying 142 App. Div. 904, 110 N. Y. S. 59; *Mills v. Husson*, (1893) 140 N. Y. 99, 35 N. E. 422; *Delafield v. Shipman*, (1886) 103 N. Y. 463, 9 N. E. 184, reversing 34 Hun 514; *Cook v. Lowry*, (1884) 95 N. Y. 103; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492; *Hill v. Guaranty Trust Co.*, (1914) 163 App. Div. 374, 148 N. Y. S. 601. See also *Stringer v. Young*, (1908) 191 N. Y. 157, 83 N. E. 690, modifying 110 App. Div. 37, 96 N. Y. S. 1052; *Matter of Harwood*, (1906) 52 Misc. 82, 102 N. Y. S. 444; *Tobin v. Grof*, (1902) 39 Misc. 412, 80 N. Y. S. 5; *Garland v. Garland*, (1901) 35 Misc. 147, 71 N. Y. S. 465; *Matter of Roos*, (1893) 4 Misc. 232, 24 N. Y. S. 862; *Matter of Dey Ermand*, (1881) 24 Hun 1; *Grant v. Grant*, (1878) 3 Redf. 283; *Potter v. McAlpine*, (1885) 3 Dem. 108; *Haxton v. Corse*, (1848) 2 Barb. Ch. 506. But it has been held that if the section is applicable at all to the income of personal estate, it can only apply to a case where that income is derived from some specific fund, or, at least, from property so situated that its income can be readily distinguished from that of all other property. Neither in terms nor in reason is it applicable to any other case. The statute is founded upon the presumption that the donor of property may naturally be supposed to intend that the income should go to the same person to whom he had given that out of which the income arises. Nothing, therefore, can properly be held to pass under it but income which proceeds from the specific property in which the future interest exists. *Dodge v. Pond*, (1861) 23 N. Y. 69, modifying 28 Barb. 121.

Cited.—This section was cited in *Horsfield v. Black*, (1899) 40 App. Div. 264, 57 N. Y. S. 1006.

§ 64. When expectant estates are deemed created. Where an expectant estate is created by grant, the delivery of the grant, and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

This section was derived from Real Property Law of 1896, § 54.

Estates in expectancy: see supra, § 35.

When expectant estates are defeated: see supra, § 57.

Qualities of expectant estates: see supra, § 59.

Death of testator or of intestate.—Where the disposition of an estate is by will, the death of the testator is deemed the commencement of the estate. *Everitt v. Everitt*, (1864) 29 N. Y. 39, reversing 29 Barb. 112. See also *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Coston v. Coston*, (1907) 118 App. Div. 1, 103 N. Y. S. 307. The same is the rule in the case of intestacy. *Van Courtlandt v. Laidley*, (1890) 59 Hun 161, 11 N. Y. S. 148.

Application of section to personal property.—The principle laid down by the section applies equally to personal property. *Tallman v. Tallman*, (1893) 3 Misc. 465, 23 N. Y. S. 734.

Cited.—This section was cited in *Knowlton v. Atkins*, (1892) 124 N. Y. 313, 31 N. E. 914, affirming 56 Hun 408, 10 N. Y. S. 77.

§ 65. Estates in severalty, joint tenancy and in common. Estates, in respect to the number and connection of their owners,

are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

This section was derived from Real Property Law of 1896, § 55.

Enumeration of estates: see *supra*, § 30.

Action of ejectment by joint tenant or tenant in common: see Code Civ. Pro., § 1500.

When action for partition may be brought by joint tenant or tenant in common: see Code Civ. Pro., § 1532.

Action for waste by joint tenant or tenant in common against his co-tenant: see Code Civ. Pro., § 1656.

Contribution between two or more owners to satisfy judgment: see Code Civ. Pro., § 1481.

Partition of lands held by state in joint tenancy or tenancy in common: see PUBLIC LANDS LAW, § 7.

Joint tenancy.—In this state when a joint tenancy is lawfully created, the common-law incidents belonging to such tenancy follow, and the right of survivorship is the principal incident of the estate. *Purdy v. Hayt*, (1883) 92 N. Y. 446; *Baldwin v. Baldwin*, (1893) 23 Civ. Pro. 268, 26 N. Y. S. 579.

§ 66. When estate in common; when in joint tenancy. Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

This section was derived from Real Property Law of 1896, § 56.

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I. GENERALLY

Disposition under a power between two or more persons: see *infra*, § 158.

When heir claiming as joint tenant or tenant in common may maintain action for partition: see Code Civ. Pro., § 1537.

Maintenance of action by joint tenant against co-tenant: see Code Civ. Pro., § 1666.

Action of ejectment against joint owners: see Code Civ. Pro., § 1516.

Shares may be set off in common on action for partition: see Code Civ. Pro., § 1548.

Redemption of realty by owners of individual shares: see Code Civ. Pro., § 1459.

Nature of estate resulting from creation of co-tenancy: see Ann. Cas. 1917C 57 note.

Right of co-tenant to compensation for improvements made, before condemnation, by one entering with consent of other co-tenant: see L. R. A. 1916F 991 note.

Abolition of common-law rule.—The rule of the common law that a grant or devise to two or more persons without other words created a joint tenancy was abolished early in the history of this state, and the rule which replaced it is embodied in the section. *Overheiser v. Lackey*, (1912) 207 N. Y. 229, 200 N. E. 738, 1914C 229, reversing 144 App. Div. 897, 129 N. Y. S. 1138.

Application of section to personal property.—The provisions of the section declaring that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy, applies to personal estate. *Matter of Kimberly*, (1896) 150 N. Y. 90, 44 N. E. 945, affirming 3 App. Div. 170, 38 N. Y. 399; *Mills v. Husson*, (1893) 140 N. Y. 99, 35 N. E. 422; *Van Brunt v. Van Brunt*, (1888) 111 N. Y. 178, 19 N. E. 60; *Bliven v. Seymour*, (1882) 88 N. Y. 469, modifying 24 Hun 603; *Everitt v. Everitt*, (1864) 29 N. Y. 39, reversing 29 Barb. 112; *Matter of Kaupper*, (1910) 141 App. Div. 54, 125 N. Y. S. 878, affirmed (1911) 201 N. Y. 534 mem.; *Matter of Helling*, (1914) 84 Misc. 684, 147 N. Y. S. 799; *Matter of Kleeman*, (1908) 61 Misc. 560, 115 N. Y. S. 982; *Matter of Lent*, (1892) 1 Misc. 264, 22 N. Y. S. 917; *Matter of Lapham*, (1885) 37 Hun 15; *Lane v. Brown*, (1880) 20 Hun 382; *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615. But the law does not recognize a tenancy by the entirety in personal property. *Matter of Albrecht*, (1892) 136 N. Y. 91, 32 N. E. 632, 32 A. S. R. 700, 18 L. R. A. 329.

II. TENANCY IN COMMON

Equality or inequality of shares.—When an equality or inequality of shares is prescribed in express words the language has always been held to create the relation of tenants in common. *Mollett v. Elmendorf*, (1897) 152 N. Y. 475, 46 N. E. 845, 57 A. S. R. 529, affirming 82 Hun 470, 31 N. Y. S. 726; *Staples v. Mead*, (1912) 152 App. Div. 745, 137 N. Y. S. 847; *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290. See also *Matter of Hoffman*, (1910) 201 N. Y. 247, 94 N. E. 990, modifying 140 App. Div. 121, 124 N. Y. S. 1089; *Mott v. Ackerman*, (1883) 92 N. Y. 539; *Matter of Tamargo*, (1915) 170 App. Div. 10, 155 N. Y. S. 845, reversing *Matter of Vosseler*, (1915) 89 Misc. 674, 152 N. Y. S. 208, reversed on other grounds (1917) 220 N. Y. 225; *Levine v. Goldsmith*, (1903) 83 App. Div. 399, 83 N. Y. S. 299; *Matter of Perry*, (1905) 48 Misc. 285, 96 N. Y. S. 879; *Roosa v. Harrington*, (1900) 31 Misc. 529, 65 N. Y. S. 601, affirmed 57 App. Div. 631, 68 N. Y. S. 1147, affirmed (1902) 171 N. Y. 341, 64 N. E. 1. Thus, where a testator gave the remainder of his estate to his children, naming them, "or any child by me begotten which may be born subsequent to the time of my decease, for their own use and benefit forever in equal shares," it was held that the children took as tenants in common; and the shares of children who died before the testator's death did not pass to the survivors under the will, but as to such shares the testator died intestate. *Matter of Krummenacker*, (1908) 60 Misc. 55, 112 N. Y. S. 596. See also *Matter of Kimberly*, (1896) 150 N. Y. 90, 44 N. E. 945, affirming 3 App. Div. 170, 38 N. Y. S. 399; *Schneider v. Heilbron*, (1906) 115 App. Div. 720, 101 N. Y. S. 152; *Matter of De Rycke*, (1904) 99 App. Div. 596, 91 N. Y. S. 159; *McDonald v. McDonald*, (1902) 71 App. Div. 116, 75 N. Y. S. 674.

Unity of possession.—A tenancy in common exists where two persons hold possession of lands by several and distinct titles, although their estate may be different, or their shares unequal, and the only unity between them is that of possession, and this possession needs only to be constructive. *Wainman v. Hampton*, (1888) 110 N. Y. 429, 18 N. E. 234; *Chittenden v. Gates*, (1897) 18 App. Div. 169, 45 N. Y. S. 768.

Tenancy in common as result of failure of tenancy by entirety through illegality of marriage. Where a tenancy by the entirety fails because of the invalidity of the marriage of the grantees, the result is a tenancy in common under this section. *Perrin v. Harrington*, (1911) 146 App. Div. 292, 130 N. Y. S. 994; *Rambaur v. Schleider*, (1917) 163 N. Y. S. 186. See *infra*, this note, IV, *Tenancy by Entirety*.

III. JOINT TENANCY

Common-law rule.—The estate of joint tenancy is an estate recognized as existing and authorized to exist by the laws of this state; and the nature and properties of such estate are the same as established by the common law. *Baldwin v. Baldwin*, (1893) 23 Civ. Pro. 268, 26 N. Y. S. 579.

Joint tenancy not favored.—The courts have steadily refused to infer a joint tenancy in the absence of words expressly intended to declare it. *Matter*

of Russell, (1901) 168 N. Y. 169, 61 N. E. 166, affirming 59 App. Div. 242, 69 N. Y. S. 563; Lyons v. Ostrander, (1901) 167 N. Y. 135, 60 N. E. 334, affirming 53 App. Div. 212, 65 N. Y. S. 818; Steinway v. Steinway, (1900) 163 N. Y. 183, 57 N. E. 312, affirming 24 App. Div. 104, 48 N. Y. S. 1046; Bisson v. West Shore R. Co., (1894) 143 N. Y. 125, 38 N. E. 104, affirming 66 Hun 604, 22 N. Y. S. 31; Dana v. Murray, (1890) 122 N. Y. 604, 26 N. E. 21; Smith v. Edwards, (1882) 88 N. Y. 92, affirming 23 Hun 223; Stevenson v. Lesley, (1877) 70 N. Y. 512, modifying and affirming 9 Hun 637; Matter of Haddock, (1915) 170 App. Div. 26, 155 N. Y. S. 630; Staples v. Mead, (1912) 152 App. Div. 745, 137 N. Y. S. 847; Matter of Conger, (1903) 81 App. Div. 493, 80 N. Y. S. 933; Manhattan Real Estate, etc., Ass'n v. Cudlipp, (1903) 80 App. Div. 532, 80 N. Y. S. 993; Jones v. Hard, (1903) 78 App. Div. 56, 79 N. Y. S. 556, affirmed without opinion (1903) 17 N. Y. 519, 67 N. E. 1084; McPhillips v. Fitzgerald, (1902) 76 App. Div. 15, 78 N. Y. S. 631, affirmed without opinion (1904) 177 N. Y. 543, 69 N. E. 1126; Matter of Sullivan, (1916) 94 Misc. 529, 159 N. Y. S. 616; Matter of Bleckwehl, (1913) 80 Misc. 468, 142 N. Y. S. 449; Gage v. Gage, (1887) 43 Hun 501, affirmed without opinion (1889) 112 N. Y. 667, 20 N. E. 414. But in order to create an estate in joint tenancy it is not necessary that the words "joint tenancy" should be used, as any other expression clearly imputing such an intent is sufficient. Overheiser v. Lackey, (1913) 207 N. Y. 229, 100 N. E. 738, 1914C 229, reversing 144 App. Div. 897, 129 N. Y. S. 1138; Purdy v. Hayt, (1883) 92 N. Y. 446; Coster v. Lorillard, (1835) 14 Wend. 265; Vandemburgh v. Vandemburgh, (1914) 85 Misc. 131, 147 N. Y. S. 244. However, the terms of the grant or devise must negative the presumption arising from the statute that it was the intention of the grantor or testator to create a tenancy in common. Overheiser v. Lackey, (1913) 207 N. Y. 229, 100 N. E. 738, Ann. Cas. 1914C 229, reversing 144 App. Div. 897, 129 N. Y. S. 1138.

Doctrine of survivorship.—The doctrine of survivorship is the distinguishing incident of title by joint tenancy, and the entire tenancy or estate upon the death of any of the joint tenants passes to the survivors, and so on to the last survivor, who takes an estate of inheritance. Purdy v. Hayt, (1833) 92 N. Y. 446; Baldwin v. Baldwin, (1893) 23 Civ. Pro. 268, 26 N. Y. S. 579; Coster v. Lorillard, (1835) 14 Wend. 265. So, where a grant, devise or bequest to two or more persons by name is in such form as to create a joint tenancy, and one of them dies before the testator, it is well settled, that the whole interest vests in the survivors; and this result will take place if the gift fails as to one of the persons from any other cause than death; and it is equally clear that when the limitation creates a tenancy in common, the gift being to several persons by name and not to them as a class, the same consequence will not follow from the death of one of them. Downing v. Marshall, (1861) 23 N. Y. 366, 80 Am. Dec. 290.

Executors as joint tenants.—Executors hold as joint tenants and upon the death of one his interest vests in the surviving executor. Matter of Steenken, (1900) 51 App. Div. 417, 64 N. Y. S. 660; Matter of Kreischer, (1898) 30 App. Div. 313, 51 N. Y. S. 802; Troy, etc., R. Co. v. Smith, (1890) 57 Hun 594, 11 N. Y. S. 261. But a general devise to executors in trust vests no estate in them except for such of the declared purposes as require that the title be vested in them. Matter of Tompkins, (1898) 154 N. Y. 634, 49 N. E. 135, modifying 10 App. Div. 572, 42 N. Y. S. 412.

Partition between joint tenants.—To maintain partition between joint tenants one must have in addition to his estate of joint tenancy some other interest or estate, which must be either an estate of inheritance, or for life, or for years, in some part of the realty to be partitioned. Baldwin v. Baldwin, (1893) 23 Civ. Pro. 268, 26 N. Y. S. 579. See also Matter of Sullivan, (1916) 94 Misc. 529, 159 N. Y. S. 616.

Dissolution of joint tenancy.—A joint tenancy may be dissolved and changed to a tenancy in common by the conveyance of one or two joint tenants. Matter of Sullivan, (1916) 94 Misc. 529, 159 N. Y. S. 616.

IV. TENANCY BY ENTIRETY

Tenancy by entirety generally: see DOMESTIC RELATIONS LAW, § 50 note.

Effect of divorce: see L. R. A. 1915C 396 note.

Common-law rule.—At common law a conveyance by a third person to husband and wife created a tenancy by entirety. Such an estate was founded

upon the ancient principle of the common law which regarded the husband and wife as one person. *Matter of Klatzl*, (1915) 216 N. Y. 83, 110 N. E. 181, reversing 166 App. Div. 921, 151 N. Y. S. 1125. See also *Jackson v. Stevens*, (1819) 16 Johns. 110; *Goelet v. Gori*, (1860) 31 Barb. 314; *Beach v. Hollister*, (1875) 3 Hun 519.

Recognition of estate.—After some fluctuation of opinion it is now settled that tenancy by the entirety is recognized in the jurisprudence of this state. *Matter of Klatzl*, (1915) 216 N. Y. 83, 110 N. E. 181, reversing 166 App. Div. 921, 151 N. Y. S. 1125. See also *Hiles v. Fisher*, (1895) 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 A. S. R. 762, modifying 67 Hun 229, 22 N. Y. S. 795; *Stelz v. Shreck*, (1891) 128 N. Y. 263, 28 N. E. 510, 26 A. S. R. 475, 13 L. R. A. 325; *Zornitein v. Bram*, (1885) 100 N. Y. 12, 2 N. E. 388, reversing 49 Super. Ct. 476; *Bertles v. Nunan*, (1883) 92 N. Y. 152, 44 Am. Rep. 361; *Meeker v. Wright*, (1879) 76 N. Y. 262, reversing 11 Hun 533; *Mackotter v. Mackotter*, (1911) 74 Misc. 214, 131 N. Y. S. 815; *Price v. Pestka*, (1900) 54 App. Div. 59, 66 N. Y. S. 297.

Conveyance by husband to himself and wife.—A husband may by conveyance to himself and his wife create such a tenancy, thereby reserving to himself the same rights he would have under a deed from a third person. *Matter of Klatzl*, (1915) 216 N. Y. 83, 110 N. E. 181, reversing 166 App. Div. 921, 151 N. Y. S. 1125.

Right of survivorship.—While a tenancy by entirety resembles a joint tenancy in that survivorship attaches to both, it is not a joint tenancy in substance or form, as it involves a more intimate union of ownership than joint tenancy or any other estate. Joint tenants are seized *per my et per tout*, whereas tenants by entirety are seized *per tout et non per my*. In a tenancy by entirety the survivor takes the estate not by right of survivorship simply, but by virtue of the grant which vested the entire estate in such grantee. *Matter of Klatzl*, (1915) 216 N. Y. 83, 110 N. E. 181, reversing 166 App. Div. 921, 151 N. Y. S. 1125; *Bertles v. Nunan*, (1883) 92 N. Y. 152, 44 Am. Rep. 361; *People v. Diekey*, (1912) 148 App. Div. 663, 133 N. Y. S. 221; *Price v. Pestka*, (1900) 54 App. Div. 59, 66 N. Y. S. 297; *Jackson v. Stevens*, (1819) 16 Johns. 110.

Necessity of lawful marriage.—Although a conveyance is made to a man and woman in the form, "husband and wife, as tenants of the entirety," they do not take as tenants by the entirety with a right of survivorship, when in fact, although living together, there was no marriage between them, either or both of the parties being bound by an existing marriage, as a tenancy by the entirety can only exist where there is a valid marital relation between the grantees at the time of the conveyance. *Perrin v. Harrington*, (1911) 146 App. Div. 292, 130 N. Y. S. 944; *Bambauer v. Schleider*, (1917) 176 App. Div. 562, 163 N. Y. S. 186. And in such case the fact that the parties verbally agree that they shall hold as tenants by the entirety, with the right of survivorship, is immaterial, as involving speculation as to what they would have agreed upon if they had known their marriage was invalid. *Bambauer v. Schleider*, (1911) 146 App. Div. 292, 130 N. Y. S. 186.

Conveyance or partition between husband and wife.—Under section 56 of the Domestic Relations Law, a husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. See also *Wurz v. Wurz*, (1891) 27 Abb. N. Cas. 58, 15 N. Y. S. 720. But it was formerly held that an action for partition between husband and wife could not be maintained unless they held as joint tenants or tenants in common. *Miller v. Miller*, (1871) 9 Abb. Pr. N. S. 444.

§ 67. Sale or lease of real property held by tenant for life with contingent remainder or remainders over to persons whose identity is unknown. In any case where real property is devised by will or conveyed by deed to a person for life, with contingent remainder or remainders over, to persons the identity of whom can not be definitely ascertained until the death of the person entitled to the life estate, the supreme court may, by order, on

such terms and conditions as seem just and proper, authorize the sale or lease of such real property, or any part thereof, whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive or such circumstances or conditions have arisen subsequent to the devise or deed that it is for the best interest of the life tenant and of the remaindermen that a sale or lease should be had, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of the life tenant and the remaindermen that a sale or lease should be had. The supreme court shall not grant such an order, unless it appears to the satisfaction of such court, that a written notice, stating the time and place of the application therefor, has been served upon the life tenant, and upon every other person in being having an estate, vested or contingent, in reversion or remainder in said real property at least eight days before the making thereof. If such beneficiary or other person is an adult without the state, or is a minor, lunatic, person of unsound mind, habitual drunkard or absentee, notice shall be served on such beneficiary or other person in such manner as the court or a justice thereof may prescribe. Upon the return day of the notice the court shall, upon its own motion, appoint a special guardian for any minor and for any lunatic, person of unsound mind or habitual drunkard who shall not be represented by a committee duly appointed.

This section was derived from Real Property Law of 1896, § 57, as added by L. 1903, ch. 432, § 1. It was amended by L. 1913, ch. 55, § 1. The amendment added the words "or lease" following the word "Sale" in the section head, and also added the words "or lease" following the word "sale" where it occurs near the end of the first sentence. The report of the Board of Statutory Consolidation (1907), page 4897, has the following note relating to this section, and to sections 70, 107, 116: "These sections require that every person in being, having an estate, vested or contingent, in reversion or remainder, in the real property in question, shall either be served with notice or shall execute a conveyance. These sections cannot, in the minds of experienced conveyancers, be safely applied in the large class of cases in which the remainder goes to the heirs of a living person. In such a case, the heirs, of course, are not ascertainable at the time when the proceeding is taken and may include collateral relatives to the remotest degree. It seems that in such cases it should be enough to regard the heirs presumptive as representing the remainder. In many cases these useful sections cannot be resorted to owing to the impossibility of bringing in all of the possible heirs of a living person."

Shares of unknown and absent owners in partition actions: see Code Civ. Pro., § 1582.

Motion to compel acceptance of title.—Where certain real estate was devised to testator's daughter for life and on her death to her surviving issue and the will directed and empowered the executors upon the death of testator's daughter without issue to sell the property and divide the proceeds among certain designated religious and charitable corporations, no power to receive the rents and profits being conferred upon the executors, the legal title to the remainder in fee was held not to be vested in them, and testator's daughter having no issue there was no person in being "having an estate vested or contingent, in reversion or remainder" in the property on whom the notice of an application for a sale thereof could be served, and a motion to compel a purchaser of the property at a sale made under the statute to complete his purchase was denied, and his deposit returned to him. *Matter of Callahan*, (1916) 96 Misc. 74, 159 N. Y. S. 942.

Cited.—This section was cited in *Matter of Cohen*, (1915) 169 App. Div. 544, 155 N. Y. S. 517, affirmed 176 App. Div. 906, affirmed (1917) 220 N. Y. 774 mem.

§ 68. Application, how made. The application must be made by petition duly verified, which shall set forth the provisions of the will or the deed creating the estate, the condition of the estate and the particular facts which make it necessary or proper that the application should be granted. After taking proof of the facts either before the court or by a referee and hearing the parties and fully examining into the matter, the court must make an order upon the application. In case the application is granted, the order must authorize the real property described in the petition to be sold or leased upon such terms and conditions as the court may prescribe, but in the case of a lease the term thereof shall not exceed twenty-one years.

This section was derived from Real Property Law of 1896, § 58, as added by L. 1903, ch. 432, § 1. It was amended by L. 1913, ch. 55, § 1. The amendment added the words "or leased" following the word "sold" near the end of the last sentence, and added the words "but in the case of a lease the term thereof shall not exceed twenty-one years," to the end of the section.

Cited.—This section was cited in *Matter of Cohen*, (1915) 169 App. Div. 544, 155 N. Y. S. 517.

§ 69. Sale, how conducted. The sale shall be made by a referee appointed by the court for that purpose and such sales may be either at public auction or by private contract, but subject in all respects to confirmation by the court before the deed is delivered and the sale consummated. In case a sale of any portion of such real property is authorized, the final order must direct the disposition of the proceeds of such sale and must direct that the proceeds of such sale be paid into the hands of some trust company authorized by law to act as trustee or to some person or persons who shall thereby become trustee or trustees for such life tenant and remaindermen, and must require the trustee to give a bond in such an amount and with such sureties as the court directs, conditioned for the faithful discharge of his trust and for the due accounting of all moneys received by him pursuant to said order. Upon the confirmation of the referee's report of sale by order of the court, the referee must execute, as directed by the court, a deed of said real property so sold.

This section was derived from Real Property Law of 1896, § 59, as added by L. 1903, ch. 432, § 1.

Cited.—This section was cited in *Matter of Cohen*, (1915) 169 App. Div. 544, 155 N. Y. S. 517.

§ 70. Instruments upon sale or lease. A deed or lease made pursuant to a final order granted as provided in the foregoing sections sixty-seven and sixty-eight shall be valid and effectual against all minors, lunatics, persons of unsound mind, habitual

drunkards and persons not in being, interested in the real property aforesaid, or having estates, vested or contingent, in reversion or remainder in said real property, but before the order directing the sale or lease can be made, all adult persons not under disability having an interest in said real estate, vested or contingent, in reversion or remainder, must make and file with the clerk of the court in which the proceedings have been instituted, a written instrument, duly executed and acknowledged, consenting that such an order of sale or lease may be made, and in no event shall such order be made without the like written consent of the life tenant if not suffering from disability.

This section was derived from Real Property Law of 1896, § 60, as added by L. 1903, ch. 432, § 1. It was amended by L. 1913, ch. 55, § 1. The amendment changed the section head which formerly read, "Conveyances upon sale", and added the words "or lease" where they appear in the section. The report of the Board of Statutory Consolidation (1907), page 4897, has a note relative to this section and to sections 67, 107 and 116. This note is given in the note following section 67, *supra*.

Section 70 of the Real Property Law of 1896 is now covered by section 90.

Effect of deed of infant, lunatic, idiot, or habitual drunkard: see Code Civ. Proc., § 2358.

Cited.— This section was cited in *Matter of Cohen*, (1915) 169 App. Div. 544, 155 N. Y. S. 517.

§ 71. Disposition of proceeds of sale. The trustees appointed by the court of funds realized from the sale of real property under these provisions shall, unless otherwise ordered by the court, invest such funds in the manner and form prescribed and regulated by law, relative to investment of trust funds by trustees, and shall pay and apply the net income, after deducting all lawful expenses and commissions, to the use of the life tenant during life and upon the death of the life tenant pay over and distribute the principal to and among the remaindermen entitled thereto in accordance with the order of the court upon an accounting.

This section was derived from Real Property Law of 1896, § 61, as added by L. 1903, ch. 432, § 1.

Section 71 of the Real Property Law of 1896 is now covered by section 91.

Trustees' investments in certain stocks regulated: see *infra*, § 116.

Investment of trust funds: see PERSONAL PROPERTY LAW, § 21.

Cited.— This section was cited in *Matter of Cohen*, (1915) 169 App. Div. 544, 155 N. Y. S. 517.

§ 72. Release of rents reserved by leases in perpetuity. 1. Any person interested in lands held under a lease in perpetuity, upon which no rent has been paid for at least twenty years, may present his petition to the courts mentioned in this section asking that it be declared that the rents and reversion have been released to the owner of the fee. Such petition shall be verified, shall describe the lease and allege that the rents and reversion have been released, and shall state such facts as the petitioner can ascertain relative to the execution of a release and the identity of the per-

sons who would otherwise be the present owners of the rents and reversion and the last known owner thereof.

2. Such petition may be presented to the supreme court or to the county court of the county where the lands are situated. The court may thereupon order all persons interested to show cause at a certain time and place why the rents and reversion should not be declared to have been released. A description of the lease and lands affected thereby and the name of the last known owner of the rents and reversion shall be specified in such order, and the order shall be published in such newspaper or newspapers and for such time as the court shall direct. The court may also direct the order to be personally served upon such persons as it shall designate.

3. The court may issue commissions to take the testimony of witnesses and may refer it to a referee to take and report proofs of the facts stated in the petition. Upon being satisfied that the matters alleged in the petition are true, the court may make an order declaring that the rents and reversion have been released to the owner of the fee. The nonpayment of rent under any such lease for twenty years shall be presumptive evidence of such a release. The entry of such order in the office of the clerk of the county where such lands are situated shall have the same effect as a release of such rents and reversion to such owner then duly executed and recorded. The county clerk shall note on the margin of the record of the original lease a minute of the entry of such order.

This section was derived from L. 1900, ch. 227, §§ 1-3.

Section 72 of the Real Property Law of 1896 is now covered by section 92

Rent due on life leases recoverable: see *infra*, § 221.

ARTICLE 4

USES AND TRUSTS

- Section 90. Executed uses existing.
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 113. Grants and devises of real property for charitable purposes.
 114. Certain educational and other charitable uses authorized.
 - 114-a. Trusts for care of cemetery lots, et cetera.
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 - *166. Executors', fiduciaries' and trustees' investments in certain stocks regulated.
 117. Commissions of trustees.

§ 90. Executed uses existing. Every estate which is now held as a use, executed under any former statute of the state, is confirmed as a legal estate.

This section was derived from Real Property Law of 1896, § 70.

Section 90 of the Real Property Law of 1896 is now covered by section 110.

* So in original. The section is numbered 116.

Charitable and educational uses in personality: see PERSONAL PROPERTY LAW, §§ 13, 14.

Purpose of statute.—It was said at an early date that the great purpose of the statute of uses was to convert nominal uses into legal estates. *Johnson v. Fleet*, (1835) 14 Wend. 176. See also *Bennett v. Garlock*, (1877) 10 Hun 328, reversed on other grounds (1880) 79 N. Y. 302, 35 Am. Rep. 517. As was said in *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805: "Our statute of uses had been modeled after the English statute (27 Henry VIII, ch. 10), and its purpose was to simplify and strengthen titles in lands, by abolishing distinctions between the mere title and the use, and in converting the beneficiary's interest into a legal estate. Under that system, however, trusts could be created and the legal estate still be separated from the use, whenever the duties of the trustee were active; that is, when they called upon him for the performance of some act about the estate. The revision, in 1830, of the statute was intended still further to prevent complications, which arose in the separation of the legal and equitable estates, through construing and enforcing a use as a trust; and, to that end, abolished all except the active express trusts enumerated; permitting all other express trusts to be executed as powers in trust."

Question of intent.—It has been held that "a use never results against the intent of the parties." *Van der Volgen v. Yates*, (1853) 9 N. Y. 219, affirming 3 Barb. Ch. 242.

Trust generally.—A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in equity now which were formerly applied to uses. *Fisher v. Fields*, (1812) 10 Johns. 495; *Johnson v. Fleet*, (1835) 14 Wend. 176. And a trust is a right of property held by one party for the benefit of another. *Gifford v. Rising*, (1889) 51 Hun 1, 3 N. Y. S. 392.

Effect of statute on personal trusts.—A trust in personality is not within the provision of the statute relating to uses and trusts. *Robb v. Washington, etc., College*, (1905) 103 App. Div. 327, 93 N. Y. S. 92, modified on other grounds (1906) 185 N. Y. 485, 78 N. E. 359; *Gilman v. McARDLE*, (1885) 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41, reversing 49 Super. Ct. 463.

§ 91. Certain uses and trusts abolished. Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

This section was derived from Real Property Law of 1896, § 71. The report of the Board of Statutory Consolidation (1907), page 4898, has the following note relating to this section: "The language of the Revised Statutes is much more exact. As § 91 now stands, it contains two principal errors: Uses and trusts were sub modo abolished by 1 R. S. 727, § 45. But 1 R. S. 727, § 45, was repealed by L. 1896, ch. 547, § 300, so that as the law now stands, there is no plain enactment abrogating the old law of uses and trusts, as it stood before 1829. It seems very clear that uses and trusts, except as authorized and modified by our present article on Uses and Trusts, should be directly abolished by a plain enactment, present in point of time, but futuritive in action. There is no need to refer the abolition back to 1829. Uses and trusts, between 1829 and 1896, depend on the Revised Statutes, and even uses executed by that statute are abundantly protected without any special reference in the present 'Real Property Law.' The language of the Revised Statutes, concerning estates and interests in lands, regarded as 'legal rights cognizable in the courts of law,' should also be restored. The present language of the section seems to imply a class of legal rights not cognizable in the courts, which is impossible, under the established maxim: 'ubi jus ibi remedium.' Its literal effect is also to abolish equitable rights in real property. In their desire not to recognize courts of law, as contradistinguished from courts of equity, the late revisers ignored the fact,

that the reform of 1846 was the fusion, and not the abolition, of courts of law and courts of equity, and that in this state a legal right is still cognizable in a court of law only. Equitable rights over real property are still recognized and protected. They should not be turned into legal rights as was unintentionally done by the late revisers in this section. Equitable rights are fixed and protected by the Constitution of the state, and the Legislature is powerless to turn them into legal rights without an amendment to the Constitution. The language of the Revised Statutes is, therefore, still relevant to present conditions and should be restored: *Gould v. Cayuga County Bank*, 86 N. Y. 75, 83; *Peter v. Delaplaine*, 49 N. Y. 362, 370; *Chipman v. Montgomery*, 63 N. Y. 221, 230; *Town of Mentz v. Cook*, 108 N. Y. 504; *Corscadden v. Haswell*, 88 App. Div. 158; *Gilbert v. Brunell*, 92 App. Div. 284."

Section 91 of the Real Property Law of 1896 is now covered by section 111.

Suspension of the power of alienation: see *supra*, § 42.

Purposes for which express trusts may be created: see *infra*, § 96.

Effect of section generally.—The weight of authority is to the effect that there can be no trusts of realty except such as are permitted by statute. *Holmes v. Mead*, (1873) 52 N. Y. 332; *Adams v. Perry*, (1871) 43 N. Y. 487; *Clemens v. Clemens*, (1867) 37 N. Y. 59, affirming 60 Barb. 366; *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290; *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 446; *Corning v. Christ Church*, (1890) 58 Hun 601 mem., 11 N. Y. S. 762, 33 N. Y. St. Rep. 766; *Gifford v. Rising*, (1889) 51 Hun 1, 3 N. Y. S. 392; *Follett v. Badeau*, (1882) 26 Hun 253; *Eysaman v. Eysaman*, (1881) 24 Hun 430; *Yates v. Yates*, (1850) 9 Barb. 324. And the statute constitutes the sole guide in determining the validity of all trusts. *People v. Simonson*, (1891) 126 N. Y. 299, 27 N. E. 380.

Effect of section on charitable uses.—Charitable uses are not exempt from the provisions of the section abolishing uses and trusts except such as are authorized thereby. *Matter of Griffin*, (1901) 167 N. Y. 71, 60 N. E. 284, reversing 45 App. Div. 102, 61 N. Y. S. 639; *Allen v. Stevens*, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8; *People v. Powers*, (1895) 147 N. Y. 164, 41 N. E. 432, 35 L. R. A. 502, reversing 83 Hun 449, 29 N. Y. S. 950, 31 N. Y. S. 1131; *Dammert v. Osborn*, (1893) 140 N. Y. 30, 35 N. E. 407, reversing 65 Hun 585, 20 N. Y. S. 474; *Holmes v. Mead*, (1873) 52 N. Y. 332; *Clemens v. Clemens*, (1867) 37 N. Y. 59, affirming 60 Barb. 366; *Bascom v. Albertson*, (1866) 34 N. Y. 584, affirming 1 Redf. 340; *Levy v. Levy*, (1835) 33 N. Y. 97, reversing 40 Barb. 585; *Follett v. Badeau*, (1882) 26 Hun 253; *Boyce v. St. Louis*, (1859) 29 Barb. 650; *Yates v. Yates*, (1850) 9 Barb. 324. And the validity of trusts for objects which are denominated charitable are governed by the same rules by which the validity of trusts for other purposes are determined. *People v. Simonson*, (1891) 126 N. Y. 299, 27 N. E. 380; *Cottman v. Grace*, (1889) 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145. It was formerly held, however, that the law of charitable uses, as recognized in England, was in force in this state; and that the provisions of the Revised Statutes relative to uses and trusts did not apply to charitable uses. *Williams v. Williams*, (1853) 8 N. Y. 525; *Tucker v. St. Clement's Church*, (1853) 8 N. Y. 558 note, affirming 3 Sandf. 242; *Andrews v. General Theological Seminary*, (1853) 8 N. Y. 559 note, reversing 4 Sandf. 156. See also *Fosdick v. Hempstead*, (1891) 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, reargument denied (1891) 126 N. Y. 651, 27 N. E. 382; *Holland v. Alcock*, (1888) 108 N. Y. 312, 16 N. E. 305, 2 A. S. R. 420, reversing 40 Hun 372; *Shotwell v. Mott*, (1844) 2 Sandf. Ch. 50.

Creation of trust by parol.—No trust can be declared except by a written instrument. *Follett v. Badeau*, (1882) 26 Hun 253. But it has been held that a trust may be proved by parol evidence. *Reid v. Fitch*, (1851) 11 Barb. 399.

Cited.—This section was cited in *Bennett v. Garlock*, (1877) 10 Hun 328, reversed (1880) 79 N. Y. 302, 35 Am. Rep. 517; *Reid v. Fitch*, (1851) 11 Barb. 399; *Allen v. Litchard*, (1916) 93 Misc. 197, 157 N. Y. S. 19.

§ 92. When right to possession creates legal ownership.

Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

This section was derived from Real Property Law of 1896, § 72.

Section 92 of the Real Property Law of 1896 is now covered by section 112.

When possession and occupation presumed to be under legal title: see Code Civ. Pro., § 368.

When real property held in trust liable to execution: see Code Civ. Pro., § 1431.

When seizure for twenty years necessary in action to recover real property or possession thereof: see Code Civ. Pro., § 365.

Buying lands in suit of person not in possession: see PENAL LAW, § 2031.

Taking possession of lands after removal by legal process: see PENAL LAW, § 2035.

Forcible entry and detainer and unlawful intrusion on real property: see PENAL LAW, §§ 2034, 2036.

Effect of section 93.—It has been held that this section is controlled by section 93 which provides that it shall not apply to trusts arising by implication of law. *Johnston v. Spicer*, (1887) 107 N. Y. 185, 13 N. E. 753.

Naked or passive trusts.—The section refers exclusively to a class of passive trusts, where the immediate possession and whole beneficial use of the land is given directly to the cestui que trust, the trustee being made, by the deed, the depository of a mere naked title, with no active duties to perform in respect to the property. In such cases, this section in connection with section 93 vests the whole estate in the beneficiary. *New York Dry Dock Co. v. Stillman*, (1864) 30 N. Y. 174. See also *Guental v. Guental*, (1906) 113 App. Div. 310, 98 N. Y. S. 1002; *Ullman v. Cameron*, (1904) 92 App. Div. 91, 87 N. Y. S. 148; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5; *Seidebach v. Knaggs*, (1899) 44 App. Div. 169, 60 N. Y. S. 774, affirmed without opinion (1901) 167 N. Y. 585, 60 N. E. 1120; *Emmis v. Brown*, (1896) 1 App. Div. 22, 36 N. Y. S. 737; *McComb v. Title Guarantee, etc., Co.*, (1901) 36 Misc. 370, 73 N. Y. S. 554, affirmed 70 App. Div. 618; *Frazier v. Western*, (1845) 1 Barb. Ch. 220; *Watson v. Le Row*, (1849) 6 Barb. 481; *Cushney v. Henry*, (1834) 4 Paige 345; *Bogert v. Perry*, (1819) 17 Johns. 351, 8 Am. Dec. 411. And the effect of the section is to turn all merely nominal or naked trust estates in real property into legal estates in the persons having the beneficial interest therein. *Sterrick v. Dickinson*, (1850) 9 Barb. 516; *Matter of Del Kay*, (1834) 4 Paige 403; *Griffen v. Ford*, (1857) 1 Bosw. 123. Thus the grantee in a deed of absolute conveyance of real property, who executed a contemporaneous declaration of trust in favor of a third person, his heirs, administrators and assigns, declaring that he held the property in trust for such person for his proper support and maintenance, the rents and profits to be paid to him, and promising upon his demand or that of his heirs, executors, administrators or assigns, to convey the premises to him or them by a good quitclaim deed warranting against all claiming under him, was held to take a mere naked trust which was abolished by sections 92, 93 and 149 of the statute, and as trustee no legal or equitable estate vested in him, but the fee vested in the person in whose favor the trust was declared. *Wendt v. Walsh*, (1900) 164 N. Y. 154, 58 N. E. 2, modifying 49 App. Div. 184, 63 N. Y. S. 62. And where a testator

after giving a portion of his estate to two of his children who were not self-supporting devised the remainder in trust for three minor children, and authorized his executors to sell his real estate and stocks for the purpose of maintaining and supporting said children, and there was no language in the will indicating the duration of such trust or the disposition of the property after its termination, it was held that the provision constituted a passive trust, and the property passed directly to the children named, the executors simply having a power of sale without title. *Steinert v. Steinert*, (1914) 161 App. Div. 841, 146 N. Y. S. 106. See also *Treat v. Vose*, (1901) 63 App. Div. 338, 71 N. Y. S. 507; *Salsbury v. Parsons*, (1885) 36 Hun 12.

Conveyance by trustee under naked trust.—A trustee upon a mere naked trust will not be decreed to convey the legal title to the party beneficially interested, as the estate is executed by the statute of uses. *Ring v. McCoun*, (1851) 10 N. Y. 268, affirming 3 Sandf. 524.

Beneficial interest as an estate.—Where one is entitled to a beneficial interest an estate of the same quality and duration as such interest vests in him. *Hutchins v. Van Vechten*, (1893) 140 N. Y. 115, 35 N. E. 446, affirming 66 Hun 69, 20 N. Y. S. 751. See also *Ellwood v. Northrup*, (1887) 106 N. Y. 172, 12 N. E. 590; *Verdin v. Slocum*, (1877) 71 N. Y. 345, reversing 9 Hun 150; *Matter of Craig*, (1847) 1 Barb. 33. So, a gift of income confers a life estate in the land, and the life tenant is not the mere beneficiary of a trust in respect to the land, but has the estate. *Matter of Clark*, (1891) 62 Hun 275, 17 N. Y. S. 93. See also *Harvey v. Brisbin*, (1888) 50 Hun 376, 3 N. Y. S. 676, affirmed (1894) 143 N. Y. 151, 38 N. E. 108. And where one has the right to the actual possession and use of premises, no title can vest in trustees. *Wainwright v. Low*, (1892) 132 N. Y. 313, 30 N. E. 747, affirming 57 Hun 386, 10 N. Y. S. 888. See also *Rose v. Hatch*, (1891) 125 N. Y. 427, 26 N. E. 467, affirming 55 Hun 457, 8 N. Y. S. 720; *Post v. Hoover*, (1859) 30 Barb. 312, affirmed (1865) 33 N. Y. 593; *Germond v. Jones*, (1842) 2 Hill 569; *Matter of McCall*, (1916) 174 App. Div. 520, 162 N. Y. S. 996; *Major v. Major*, (1917) 177 App. Div. 102, 163 N. Y. S. 925. But the sections of the statute which take away the nominal title and vest it in the beneficiary intended do not apply to a case where the grantee has himself a beneficial interest in the grant and is something more than the holder of the mere nominal title. *King v. Townsend*, (1894) 141 N. Y. 358, 36 N. E. 513, affirming 65 Hun 567, 20 N. Y. S. 602. Nor was it the intention of the statute to convert an active trust previously existing, in which the trustee had the management of the land, and the receipt and payment of the rents and income, into a legal estate in the hands of the cestui que trust. *Anderson v. Mather*, (1870) 44 N. Y. 249.

Title held by persons not beneficially interested.—The general rule is that the law of this state does not tolerate the holding of title to lands by persons not beneficially interested therein, except upon some valid trust properly manifested. *Hubbard v. Gilbert*, (1881) 25 Hun 596.

Establishment of trust by recital.—A trust may be established by a recital in a conveyance to which the trustee and cestui que trust are parties, though the deed to the trustee is absolute in form, and in such case if the cestui que trust is entitled to the actual possession, and the receipt of the rents and profits, the estate is executed in him by the statute of uses. *Wright v. Douglass*, (1853) 7 N. Y. 564, reversing 10 Barb. 97.

When legal estate passes from trustee.—The rule at common law as well as by statute is that the trust takes that quantity of interest only which the purposes of the trust require and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled. *Bennett v. Garlock*, (1880) 79 N. Y. 302, 35 Am. Rep. 517, reversing 10 Hun 328; *Nicoll v. Walworth*, (1847) 4 Denio 385. See also *Hopkins v. Kent*, (1895) 145 N. Y. 363, 40 N. E. 4; *Locke v. Farmers' Loan, etc., Co.*, (1893) 140 N. Y. 135, 35 N. E. 578, reversing 66 Hun 428, 21 N. Y. S. 524; *Selden v. Vermilya*, (1850) 3 N. Y. 525, reversing 2 Sandf. 568; *Ennis v. Brown*, (1896) 1 App. Div. 22, 36 N. Y. S. 737; *Fellows v. Emperor*, (1852) 13 Barb. 92; *Welch v. Silliman*, (1842) 2 Hill 491.

Trustee and beneficiary as same person.—One of the essential features of a trust is the creation of an estate, or principal sum, from which rents or profits may be derived that may be used for the benefit of another. *Gifford*

v. Rising, (1889) 51 Hun 1, 3 N. Y. S. 392. And, consequently, the same person cannot at the same time be both sole trustee and sole beneficiary of the same interest. **Weeks v. Frankel, (1910) 197 N. Y. 304, 90 N. E. 969, reversing 128 App. Div. 223, 112 N. Y. S. 562; Greene v. Greene, (1891) 125 N. Y. 506, 26 N. E. 739, 21 A. S. R. 743, affirming 54 Hun 93, 7 N. Y. S. 284; Tuck v. Knapp, (1903) 42 Misc. 140, 85 N. Y. S. 1001.**

Conveyance in trust for use of another.—Where land was conveyed to one, in trust for the use of another, his heirs and assigns, without limitation, and the grantee, at the same time, executed a mortgage for part of the purchase money, it was held that the legal estate vested in the cestui que use, subject to the mortgage, the deed and mortgage being construed as one instrument. **Rawson v. Lampman, (1851) 5 N. Y. 456.** See also **Matter of Gawne, (1903) 82 App. Div. 374, 81 N. Y. S. 861, affirmed without opinion (1903) 176 N. Y. 597, 68 N. E. 1116.**

Conveyance in trust for children and survivor.—Upon a conveyance of real property named in the deed, "and the survivor of them," such children take the use for life only, which by virtue of the Statutes of Uses vested in them as a legal estate of like quality, and, upon the death of the survivor of the two children, the remainder in fee vests in the heirs of the grantee. **Kelly v. Kremm, (1912) 78 Misc. 576, 138 N. Y. S. 626.**

Purchase under agreement to hold in trust.—When one pays the purchase price of lands the title to which is taken by others under an agreement to hold them in trust for the purchaser, he, being entitled to possession and rents and profits, is vested with the legal title. **Mullin v. Mullin, (1907) 119 App. Div. 521, 104 N. Y. S. 323.**

Effect of power of sale.—The presence in a will, of an imperative power of sale given to the executors to be exercised at a future time, does not necessarily prevent a vesting, especially when it is apparent from the other provisions of the will that it was intended that the estate should vest presently. An estate may vest subject to the execution of the power, which may be for the purpose of distribution only, the effect of which would be to transfer the title in the realty to the proceeds. **Matter of Brown, (1897) 154 N. Y. 313, 48 N. E. 537, affirming 91 Hun 120, 36 N. Y. S. 131.** Where a trustee was directed to dispose of the lands granted to him, and to apply the proceeds to the support of a certain individual and his family, and after the decease of such individual to pay the residue, if any, to his legal representative, it was held, in an action between the heir at law and mere naked possessor, that on the death of such individual the land passed to his heir at law, it not appearing that it had been disposed of by the trustee. **Welch v. Allen, (1839) 21 Wend. 147.** Where a deed, purporting to be an instrument between E., of the first part and C., in trust for three infant children of C., "with power to sell and convey or mortgage without the appointment of a guardian, of the second part," conveyed certain premises to the party of the second part, heirs and assigns, forever, with no other reference to a trust or power save that contained in the first clause, it was held that the three infants were the real beneficiaries of the grant, that the land passed to and vested in them subject to the execution of the power, which was a general trust power to be executed solely for their benefit. **Syracuse Sav. Bank v. Holden, (1887) 105 N. Y. 415, 11 N. E. 950, affirming 36 Hun 168.**

Devise to executors in trust. A general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. **Matter of Tompkins, (1898) 154 N. Y. 634, 49 N. E. 135, modifying 10 App. Div. 572, 42 N. Y. S. 412; Manice v. Manice, (1871) 43 N. Y. 303, reversing 1 Laus. 348; Everitt v. Everitt, (1864) 29 N. Y. 39, reversing 29 Barb. 112.**

Covenant to stand seized. A covenant to stand seized has been held to be as good as a grant. **Allen v. Litchard, (1916) 93 Misc. 197, 157 N. Y. S. 19.** See also **Eysman v. Eysman, (1881) 24 Hun 430.**

Construction to avoid intestacy and to favor vesting of estates.—It is elementary law that the courts should adopt that construction, whenever possible, which will avoid intestacy and which is most favorable to the vesting of the estate devised, and which will avoid the disinheritance of the remainderman who happens to die before the termination of the life estate. These rules are so familiar and so well settled that it is quite superfluous to cite authorities to support them. **Lewis v. Howe, (1903) 174 N. Y. 340, 66 N. E. 975, 1101, affirming 64 App. Div. 572, 72 N. Y. S. 851.** See also **Greer v. Ches-**

ter, (1891) 62 Hun 329, 17 N. Y. S. 238, affirmed without opinion (1892) 131 N. Y. 629, 30 N. E. 863.

Cited.—This section was cited in *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290; *Germond v. Jones*, (1842) 2 Hill 569.

§ 93. Trustee of passive trust not to take. Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

This section was derived from Real Property Law of 1896, § 73.

Section 93 of the Real Property Law of 1896 is now covered by section 113.

What constitutes active trust: see 11 L. R. A. (N. S.) 331 note.

Right to compel trustee of dry trust to convey to beneficiary: see 38 L. R. A. (N. S.) 198 note.

Effect of passive trust.—Where the trust designated in the will is a dry or passive trust involving no active duties on the part of the trustees, the law vests the legal title in the beneficiary. *Jacoby v. Jacoby*, (1907) 188 N. Y. 124, 80 N. E. 676, affirming 113 App. Div. 913, 100 N. Y. 1122; *Denison v. Denison*, (1906) 185 N. Y. 438, 78 N. E. 162, affirming 103 App. Div. 523, 86 N. Y. S. 604, 93 N. Y. S. 1128; *Fisher v. Hall*, (1869) 41 N. Y. 416. See also *Bates v. Ledgerwood Mfg. Co.*, (1891) 130 N. Y. 200, 29 N. E. 102; *Helck v. Reinheimer*, (1887) 105 N. Y. 470, 12 N. E. 37; *Steinert v. Steinert*, (1914) 161 App. Div. 841, 146 N. Y. S. 106; *Matter of Cooney*, (1906) 112 App. Div. 659, 98 N. Y. S. 676; *Matter of De Rycke*, (1904) 99 App. Div. 596, 91 N. Y. S. 159; *Matter of Gawne*, (1903) 82 App. Div. 374, 81 N. Y. S. 861, affirmed without opinion (1903) 176 N. Y. 597, 68 N. E. 1116; *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 416; *Ludlow v. St. John's Church, etc.*, (1910) 68 Misc. 400, 124 N. Y. S. 75; *Burns v. Allen*, (1895) 89 Hun 552, 35 N. Y. S. 342, affirmed without opinion (1897) 154 N. Y. 741, 49 N. E. 1094. And the rule takes the estate from the mere passive holder of the legal title, and executes the practical intent by vesting it in the beneficiary. *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 895. Thus, where there is no provision authorizing trustees to collect the rents and profits of real estate, either express or implied, the statute vests the legal estate in the beneficiary. *Monypeny v. Monypeny*, (1911) 202 N. Y. 90, 95 N. E. 1, reversing 136 App. Div. 677, 121 N. Y. S. 590. See also *Woerz v. Rademacher*, (1890) 120 N. Y. 62, 23 N. E. 1113; *Verdin v. Slocum*, (1877) 71 N. Y. 315, reversing 9 Hun 150; *Lewis v. Howe*, (1901) 64 App. Div. 572, 72 N. Y. S. 851, affirmed (1903) 174 N. Y. 340, 66 N. E. 975, 1101; *Seidelbach v. Knaggs*, (1899) 44 App. Div. 169, 60 N. Y. S. 774, affirmed without opinion (1901) 167 N. Y. 585, 60 N. E. 1120; *Cutler v. Wimberry*, (1916) 160 N. Y. S. 712. So, where a testator, after dividing his property into nine parts, devised one share thereof in trust for his wife during her natural life, and to her heirs forever, subject to a life estate to the husband after the death of the wife, it was held that the title to the premises, under this devise, vested directly in the wife, and not in the trustee, during her life. *Noble v. Cromwell*, (1858) 26 Barb. 475, affirmed 3 Abb. App. Dec. 382, 27 How. Pr. 289.

Void trust.—A trust for a purpose not authorized by statute becomes, eo instanti, a passive trust, under which title vests directly in the beneficiary. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158; *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 416. In such case the trustee is a mere conduit through which title passes to the beneficiary. *Guental v. Guental*, (1906) 113 App. Div. 310, 98 N. Y. S. 1002.

Elements of valid trust under section.—Under this section the deed or devise must be directly to the person in whom the right of possession and profits shall be invested, and not to any other for the use of or in trust of such person, and if it is so made to another person to the use of or trust for another, the trustee takes no estate whatever. It becomes absolutely void, so that the right of the trustee to the possession and to receive the profits becomes an essential and necessary element, in order to constitute a valid trust under the statutes. *Salsbury v. Parsons*, (1885) 36 Hun 12; *Hotchkiss v. Elting*, (1861) 36 Barb. 38; *Fowler v. Depau*, (1857) 26 Barb. 224.

Implied and express trusts.—Implied trusts are well known in the law as contradistinguished from express trusts, and are classed under a distinct head. Express trusts are created by deed or by will; implied trusts arise in general by construction of law upon the acts or situation of the parties. *Johnson v. Fleet*, (1835) 14 Wend. 176.

Exclusion of implied trusts.—Under this section implied and resulting trusts are not included in, or affected by, its provisions and it does not extend to them. They are, and must necessarily be, excluded, from their very nature. Their existence, generally speaking, can only be established by parol evidence; and it requires the power of a court of equity to compel the performance of such implied agreements, and to protect the rights and interests of the cestui que trust therein. *Foote v. Foote*, (1870) 58 Barb. 258.

Conveyance to one person for use and benefit of another.—Where a conveyance of lands is made to one person in trust for the use and benefit of another, his heirs and assigns, without limitation, no interest vests in the trustee, but the entire estate, legal and equitable, vests in the person to whose use the conveyance is made. *Rawson v. Lampman*, (1851) 5 N. Y. 456. See also *Syracuse Sav. Bank v. Holden*, (1887) 105 N. Y. 415, 11 N. E. 950, affirming 36 Hun 168; *Matter of Gawne*, (1903) 82 App. Div. 374, 81 N. Y. S. 861, affirmed without opinion (1903) 176 N. Y. 597, 68 N. E. 1116; *Fisher v. Hall*, (1869) 41 N. Y. 416; *Ramsay v. De Remer*, (1892) 65 Hun 212, 20 N. Y. S. 143. So, the disposition of property to one in trust for another is invalid if it is intended that the beneficiary shall have the right both to possession and profits. *Snedeker v. Congdon*, (1899) 41 App. Div. 433, 58 N. Y. S. 885. See also *Matter of Martinus*, (1909) 65 Misc. 135, 121 N. Y. S. 103; *Mullin v. Mullin*, (1907) 119 App. Div. 521, 104 N. Y. S. 323.

Application of rule as to passive trusts to personalty.—The rule that a mere passive trust of realty will be avoided, and the beneficiaries takes the legal estate, applies to personal estate. *Matter of De Rycke*, (1904) 99 App. Div. 596, 91 N. Y. S. 159. See also *Ullman v. Cameron*, (1904) 92 App. Div. 91, 87 N. Y. S. 148.

Cited.—This section was cited in *Allen v. Litchard*, (1916) 93 Misc. 197, 157 N. Y. S. 19; *Toher v. Crounse*, (1907) 57 Misc. 252, 107 N. Y. S. 990; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5 (dissenting opinion per Laughlin, J.); *Matter of England*, (1910) 69 Misc. 523, 127 N. Y. S. 881; *Shuler v. Shuler*, (1909) 63 Misc. 604, 118 N. Y. S. 639, reversed 137 App. Div. 515; *Treat v. Vose*, (1901) 63 App. Div. 338, 71 N. Y. S. 507.

§ 94. Grant to one where consideration paid by another. A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another.

This section was derived from Real Property Law of 1896, § 74.

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I. GENERALLY

Part payment of consideration for land purchased in name of another: see 2 Ann. Cas. 667 note.

Purchase by agent in own name: see 5 Ann. Cas. 255 note; 12 Ann. Cas. 805 note.

Purchase in name of one spouse with funds furnished partly by each: see Ann. Cas. 1915D 654 note.

Purchase by husband in name of wife: see Ann. Cas. 1915C 1082.

Purchase by husband in own name with wife's money: see Ann. Cas. 1915D 625 note.

Husband's investment of wife's corporate property in his own name as creating trust in her favor: see 6 L. R. A. (N. S.) 381 note; 26 L. R. A. (N. S.) 161 note.

Statute of limitations as affecting trust arising from husband's taking in his own name title to lands inherited by or purchased with money of wife: see 12 L. R. A. (N. S.) 493 note.

Common law rule.—The rule at common law was that if lands were conveyed to one person, the consideration for which was wholly paid by another, a trust resulted in favor of the person who paid the price. Such a trust, being raised by implication of law, was held not to be within the Statute of Frauds. *Garfield v. Hatmaker*, (1857) 15 N. Y. 475; *O'Brien v. Gill*, (1915) 166 App. Div. 92, 151 N. Y. S. 682; *Manahan v. Holmes*, (1908) 58 Misc. 86, 110 N. Y. S. 300; *Buffalo, etc., R. Co. v. Lampson*, (1867) 47 Barb. 533; *Reid v. Fitch*, (1851) 11 Barb. 399; *Watson v. Le Row*, (1849) 6 Barb. 481; *Jackson v. Morse*, (1819) 16 Johns. 197, 8 Am. Dec. 306.

Purpose of section.—The purpose of the statute was to abrogate the common law doctrine of resultance by legal implication of a trust in favor of the party paying the consideration, and it has no application to a case where the trust is expressly reserved by the instrument making the grant, or declared by another instrument relieving it from the effect of a secret trust. The resulting trust which was within the denunciation of the statute was dependent upon the payment of the consideration before the execution of the conveyance. *Woerz v. Rademacher*, (1890) 120 N. Y. 62, 23 N. E. 1113. See also *Niver v. Crane*, (1885) 98 N. Y. 40; *McCartney v. Bostwick*, (1865) 32 N. Y. 52, reversing 31 Barb. 390; *O'Brien v. Gill*, (1915) 166 App. Div. 92, 151 N. Y. S. 682; *McCahill v. McCahill*, (1895) 11 Misc. 258, 32 N. Y. 836; *Reid v. Fitch*, (1851) 11 Barb. 399; *Watson v. Le Row*, (1849) 6 Barb. 481; *Horsford v. Merwin*, (1848) 5 Barb. 51; *Proseus v. McIntyre*, (1849) 5 Barb. 424; *Tappan v. Butler*, (1860) 7 Bosw. 480; *Jackson v. Moore*, (1827) 6 Cow. 706; *Abbey v. Taber*, (1890) 58 Hun 602 mem., 11 N. Y. S. 548, affirmed without opinion (1892) 134 N. Y. 615, 32 N. E. 649; *Gould v. Gould*, (1889) 51 Hun 9, 3 N. Y. S. 608; *Cassague v. Marvin*, (1888) 48 Hun 619 mem., 1 N. Y. S. 590. And the statute was also obviously intended to prevent a secret trust in favor of the person paying the consideration. *Reitz v. Reitz*, (1880) 80 N. Y. 538, reversing 14 Hun 536. See also *Haack v. Weicken*, (1889) 118 N. Y. 67, 23 N. E. 133, reversing 42 Hun 486, 4 N. Y. St. Rep. 453; *Siemon v. Schurek*, (1864) 29 N. Y. 598, affirming 33 Barb. 9; *Day v. Roth*, (1858) 18 N. Y. 448; *Lee v. Timken*, (1896) 10 App. Div. 213, 41 N. Y. S. 979; *Stebbins v. Morris*, (1885) 23 Fed. 360. And to protect creditors against the fraud of their debtors, and to apply the debtor's property to their benefit, although he has changed the form of it, and parted with his title. *Kline v. McDonnell*, (1891) 62 Hun 177, 16 N. Y. S. 649; *Curtin v. Curtin*, (1890) 58 Hun 607 mem., 11 N. Y. S. 938. But the statute does not interfere with other equities and rights existing independent of or in connection with the payment of the purchase price of the property. It is only the common law

trust for the benefit of an individual from whom the consideration for a grant issues, and resulting from the fact of payment of the consideration, and having no other foundation, that the statute abolishes. *Carr v. Carr*, (1873) 52 N. Y. 251, affirming 4 Lans. 314; *Smith v. Balcom*, (1897) 24 App. Div. 437, 48 N. Y. S. 487.

Construction in connection with section 270.—This section must be read and construed in connection with section 270, *infra*. *Quinn v. Quinn*, (1902) 69 App. Div. 598, 75 N. Y. S. 83.

Construction to prevent fraud or mistake.—The provisions of this section have always been given full force and effect by the courts, except in cases of fraud or mistake, where to do so would be to permit a fraud either actual or constructive to be perpetrated on an innocent party. *Augermiller v. Ewald*, (1909) 133 App. Div. 691, 118 N. Y. S. 195; *Colnon v. Buckley*, (1907) 117 App. Div. 742, 102 N. Y. S. 912; *Fagan v. McDonnell*, (1906) 115 App. Div. 89, 100 N. Y. S. 641, affirmed without opinion (1908) 191 N. Y. 515, 84 N. E. 1112; *Stevens v. Union Trust Co.*, (1890) 57 Hun 498, 11 N. Y. S. 268. And it is well settled that unless it appears that the person paying the consideration has consented to an unconditional and absolute conveyance of the property to another without any recognition or intimation in respect to his rights, the statute in question will not protect the attempted fraud; and no presumption can be indulged in to support such a defense. *St. Stanislaus Church v. Allgemeine Verein*, (1898) 31 App. Div. 133, 52 N. Y. S. 922, affirmed without opinion (1900) 164 N. Y. 606, 58 N. E. 1086.

Conclusiveness of consideration.—It is well settled that the acknowledgment of the receipt of the consideration expressed in a deed is open to explanation, and that it may be resorted to even to uphold a conveyance when attacked by creditors, even if it discloses a different consideration than the one alleged. *Ham v. Van Orden*, (1881) 84 N. Y. 257; *McKinster v. Babcock*, (1863) 26 N. Y. 378, reversing 37 Barb. 265; *McCrea v. Purmort*, (1836) 16 Wend. 460, 30 Am. Dec. 103.

Application of section to partnership property.—Real estate purchased for and appropriated to partnership purposes, and paid for out of partnership funds, is partnership property, and although the legal title is taken in the name of one of the partners equity will hold him as trustee for the firm. Real estate so purchased is not within the provisions of the section providing that when a grant for a valuable consideration shall be made to one person, and the consideration paid by another, no use or trust shall result in favor of the person making the payment. *Fairchild v. Fairchild*, (1876) 64 N. Y. 471, affirming 5 Hun 407; *Fisher v. Boecher*, (1892) 63 Hun 629 mem., 17 N. Y. S. 814.

Application of section to leasehold interest.—It has been held that, where a tenant under a lease had an estate in the land, the section applied, and no trust resulted in favor of one who paid the consideration for the purchase of a lease for a third party. *Denning v. Kane*, (1889) 7 N. Y. S. 704. See also *Ostrander v. Livingston*, (1848) 3 Barb. Ch. 416.

Application to express trust.—Where an express trust has been created the section does not apply. *Carr v. Carr*, (1873) 52 N. Y. 251, affirming 4 Lans. 314; *Gage v. Gage*, (1894) 83 Hun 362, 31 N. Y. S. 903; *Poppenhusen v. Poppenhusen*, (1910) 68 Misc. 548, 125 N. Y. S. 269, affirmed 149 App. Div. 307.

Land conveyed under invalid oral trust.—Where land has been conveyed to a grantee upon an oral trust, invalid under the Statute of Frauds and under this section, yet it is lawful for him to perform it, and if he conveys and receives the proceeds the law will treat him as a trustee of personal property realized for the benefit of the cestui que trust, who may maintain an action to recover such proceeds. *Bork v. Martin*, (1892) 132 N. Y. 280, 30 N. E. 584, 28 A. S. R. 570. See also *Robbins v. Robbins*, (1882) 89 N. Y. 251, reversing 47 N. Y. Super. Ct. 193; *Foote v. Bryant*, (1872) 47 N. Y. 544.

Husband taking title in wife's name.—The fact that a husband furnished the purchase money and took title to certain premises in the name of his wife, unqualified and unexplained, has been held to create a gift to her, so that title passed to her heirs upon her death. *Weigert v. Schlesinger*, (1912) 150 App. Div. 765, 135 N. Y. S. 335, affirmed (1914) 210 N. Y. 573 mem. See also *McCartney v. Fitchworth*, (1907) 119 App. Div. 547, 104 N. Y. S. 45; *Kine v. Farrell*, (1902) 71 App. Div. 219, 75 N. Y. S. 542; *McCahill v. McCahill*,

(1893) 71 Hun 221, 25 N. Y. S. 219; *Rush v. Dilks*, (1887) 43 Hun 282, affirmed without opinion (1890) 120 N. Y. 688, 24 N. E. 1096. But the statute does not apply in favor of a wife where lands were purchased with money of the husband, but were not conveyed nor agreed to be conveyed to him. *Phelps v. Phelps*, (1894) 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625.

Right to resulting trust.—The provision of the section preserving the right to a resulting trust in cases where the grantee "takes the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration," is not available to the extent of the whole property conveyed, if at all, to one who paid less than the whole consideration. *Schierloh v. Schierloh*, (1895) 148 N. Y. 103, 42 N. E. 409, affirming 72 Hun 150, 25 N. Y. S. 676. "The person paying the consideration money must take the conveyance to himself or he can have no legal or equitable interests in the land." *Garfield v. Hatmaker*, (1857) 15 N. Y. 475. See also *Stebbins v. Morris*, (1885) 23 Fed. 360. And in *Everett v. Everett*, (1872) 48 N. Y. 218, such was held to be the legal consequence of the conveyance, although the deed was delivered to and retained by the person who paid the consideration. So, where one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and no trust results in favor of the purchaser. *Hoar v. Hoar*, (1888) 48 Hun 314, 1 N. Y. S. 379, affirmed without opinion (1891) 125 N. Y. 735, 26 N. E. 758. See also *O'Connell v. Madden*, (1889) 7 N. Y. S. 338. Thus where a married woman paid the consideration for the conveyance of land which was, without her knowledge or consent, taken by her brother absolutely in his own name, without the expression of any trust, it was held that she was within the exception by which a trust results for her benefit, although she consented to a conveyance which would have been ineffectual as a trust and would have vested the whole estate in herself. *Lounsbury v. Purdy*, (1859) 18 N. Y. 515, affirming 16 Barb. 376. See also *Brown v. Cherry*, (1874) 57 N. Y. 645, reversing 59 Barb. 628. And a person who intentionally invests money in the purchase of land in the name of another, to whom an absolute conveyance is made, cannot claim any resulting trust. *Day v. Roth*, (1858) 18 N. Y. 448.

Property held as collateral.—Where a defendant at the time of the delivery of a full covenant warranty deed contended that he should be relieved from liability under an open judgment because he regarded the property as held by him as collateral, such contention was held not to be a sound proposition of law; as knowledge of the existence of an incumbrance, even if possessed by the plaintiff, could not have prevented the operation of the covenant. *Deleo Holding Co. v. Rosenthal*, (1917) 164 N. Y. S. 785. See also *Huyek v. Andrews*, (1889) 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 A. S. R. 432.

Cited.—This section was cited in *Schultze v. New York*, (1886) 103 N. Y. 307, 8 N. E. 528; *Levy v. Brush*, (1871) 45 N. Y. 589, reversing 8 Abb. Pr. N. S. 418, 31 N. Y. Super. Ct. 653; *Ring v. McCoun*, (1851) 10 N. Y. 268, affirming 3 Sandf. 524; *Skidmore v. Guental*, (1911) 143 App. Div. 407, 128 N. Y. S. 402; *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158; *Pfeffer v. Kling*, (1901) 58 App. Div. 179, 68 N. Y. S. 641, affirmed (1902) 171 N. Y. 668 mem.; *Flaum v. Kaiser Bros. Co.*, (1910) 66 Misc. 586, 132 N. Y. S. 100, affirmed without opinion 144 App. Div. 897, 129 N. Y. S. 1122; *Bitter v. Jones*, (1882) 28 Hun 492; *Ludlow v. Van Ness*, (1861) 8 Bosw. 178.

II. FRAUDS AGAINST CREDITORS

Nature of creditors' interest.—The interest or right secured to creditors by this section is an equitable interest, enforceable only in equity. *Ocean Nat. Bank v. Olcott*, (1871) 46 N. Y. 12; *Wood v. Robinson*, (1860) 22 N. Y. 564; *Garfield v. Hatmaker*, (1857) 15 N. Y. 475. See also *Stebbins v. Morris*, (1885) 23 Fed. 360; *Underwood v. Sutcliffe*, (1879) 77 N. Y. 58, reversing 10 Hun 453; *National Bank v. Van Steenburgh*, (1892) 65 Hun 621 mem., 20 N. Y. S. 35; *Ocean Nat. Bank v. Hodges*, (1876) 9 Hun 161. The trust in favor of existing creditors arises under the statute by presumption of law, in the absence of any proof as to the intention of the

parties. *Platt v. Mead*, (1881) 9 Fed. 91. But the mere purpose of placing lands beyond the reach of future creditors by having them conveyed to a third person does not of itself afford ground for invoking the remedial jurisdiction of equity. *Binkowski v. Moskiewitz*, (1911) 144 App. Div. 161, 128 N. Y. S. 803. See also *Irving Nat. Bank v. Gray*, (1916) 174 App. Div. 29, 160 N. Y. S. 341. Nor does an existing indebtedness alone render a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an intent to defraud. *Carr v. Breese*, (1880) 81 N. Y. 584, reversing 18 Hun 134.

Nature of estate in land conveyed to defraud creditors.—One who procures land to be conveyed to another for the purpose of defrauding his creditors has no legal estate therein which can be reached by execution, or which on his death descends to his heirs. This rule is the penalty imposed for the prevention of fraud and for the protection of subsequent purchasers, and the reason for its application is not weakened in case the grantee is not a participant in the fraud. *Robertson v. Sayre*, (1892) 134 N. Y. 97, 31 N. E. 250, 30 A. S. R. 627, affirming 53 Hun 490, 6 N. Y. S. 649. See also *Underwood v. Sutcliffe*, (1879) 77 N. Y. 58, reversing 10 Hun 453; *Brewster v. Power*, (1844) 10 Paige 562. And where a grant of land is made to one person, the consideration for which is paid by or in behalf of another, the legal title is in the grantee, notwithstanding the conveyance is made for the purpose of defrauding the creditors of the grantor, and upon a parol trust in his favor; and so long as the grantee holds such title, the property is subject to the claims of his creditors, to the same extent as any other property to which he has title. But until such creditors obtain a lien upon the property, the grantee's right of alienation is perfect in respect to it, and it is not a fraud upon his creditors for him to convey it to the real owner. *Davis v. Graves*, (1859) 29 Barb. 480. See also *City Equity Co. v. Elm Park Realty Co.*, (1909) 135 App. Div. 856, 120 N. Y. S. 437.

Presumption of fraudulent intent.—The presumption of fraudulent intent, arising by reason of the statute as against the creditors at the time, of one who pays the consideration for a grant of land to another, is not conclusive but simply casts the burden upon the grantee, in defense of his title, to disprove a fraudulent intent. This presumption may be overcome by proof that the one paying the consideration was at the time neither insolvent nor contemplating insolvency, but had, aside from the consideration paid for the property so granted, ample funds to pay his debts, and that an inability to meet his obligations was not and could not reasonably have been supposed to have been in his mind. *Dunlap v. Hawkins*, (1874) 59 N. Y. 342, affirming 2 Thomp. & C. 292. See also *Scott v. Mead*, (1889) 37 Fed. 865; *McCartney v. Bostwick*, (1865) 32 N. Y. 54, reversing 31 Barb. 390; *McCormick v. Wilder*, (1901) 61 App. Div. 619 mem., 70 N. Y. S. 627; *Youmans v. Boomhower*, (1874) 3 Thomp. & C. 21. And the statute does not inhibit a trust to a party paying the purchase money, but it merely declares that no trust results from the payment, and that a grant of real property for a valuable consideration to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration. *Jeremiah v. Pitcher*, (1898) 26 App. Div. 402, 49 N. Y. S. 788, affirmed without opinion (1900) 163 N. Y. 574, 57 N. E. 1113. Except as against creditors, the title is perfect in the grantee, and as against them it is perfect, if the grantee can disprove a fraudulent intent. *Ocean Nat. Bank v. Oleott*, (1871) 46 N. Y. 12. See also *Norton v. Stone*, (1840) 8 Paige 222; *Jackson v. Forrest*, (1848) 2 Barb. Ch. 576.

Beneficiaries in order of priority.—Under this section a trust results only in favor of creditors existing at the time of the transfers, and not subsequent creditors. *Platt v. Mead*, (1881) 9 Fed. 91; *Garfield v. Hatmaker*, (1857) 15 N. Y. 475; *Irving Nat. Bank v. Gray*, (1916) 174 App. Div. 29, 160 N. Y. S. 341; *Callegari v. Sartori*, (191) 174 App. Div. 102, 160 N. Y. S. 931, affirmed (1916) 219 N. Y. 655 mem. But subject to this limitation, the trust is in behalf of all the creditors in the order of priority of their judgment liens. *Brown v. Chubb*, (1892) 135 N. Y. 174, 31 N. E. 1030. See also *Murphy v. Briggs*, (1882) 89 N. Y. 446, affirming 23 Hun 95; *Ocean Nat. Bank v. Oleott*, (1871) 46 N. Y. 12; *Mandeville v. Campbell*, (1899) 45 App. Div. 512 61 N. Y. S. 443.

"In violation of some trust."—The violation of a mere promise, by the grantee named in a conveyance, to take a deed in the name of another who contributed to the consideration, is not a violation of a trust within the meaning of the provision preserving the right to a resulting trust in cases where the grantee named in the conveyance, "in violation of some trust, purchases the property so conveyed with money or property belonging to another." *Schierloh v. Schierloh*, (1895) 148 N. Y. 103, 42 N. E. 409, affirming 72 Hun 150, 25 N. Y. S. 676. And the fact that one paid the consideration would raise no trust in favor either of himself or his heirs at law unless the grantee took the conveyance without his consent or knowledge or "in violation of some trust." *Cooke v. Higgins*, (1912) 152 App. Div. 204, 136 N. Y. S. 641; *London v. Epstein*, (1910) 138 App. Div. 513, 123 N. Y. S. 399. See also *McKinley v. Hessen*, (1909) 135 App. Div. 832, 120 N. Y. S. 257, reversed on other grounds (1911) 202 N. Y. 24; *Lee v. Timken*, (1896) 10 App. Div. 213, 41 N. Y. S. 979; *Kincaid v. Kincaid*, (1895) 85 Hun 141, 32 N. Y. S. 476, affirmed without opinion (1899) 157 N. Y. 715, 53 N. E. 1126.

§ 95. Bona fide purchasers protected. An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust.

This section was derived from Real Property Law of 1896, § 75.

Transferee of trust property protected: see *infra*, § 104.

Notice to beneficiary and other persons where property affected by trust is conveyed, mortgaged or leased: see *infra*, § 107.

Protection to person paying money to trustee: see *infra*, § 108.

Conveyances to defraud creditors and question of fraudulent intent: see *infra*, §§ 262-265.

Rights of purchaser or incumbrancer for valuable consideration protected: see *infra*, § 266.

Constructive notice.—Where a purchaser of land has not actual notice of a resulting trust, yet, if the circumstances were such as would have put a prudent man upon an inquiry which, if prosecuted diligently, would have disclosed the existence of the trust, he cannot be deemed a bona fide purchaser in good faith. *Baker v. Bliss*, (1868) 39 N. Y. 70. See to same effect *Parker v. Conner*, (1883) 93 N. Y. 118, 45 Am. Rep. 178, reversing 47 Super. Ct. 522; *Stearns v. Gage*, (1879) 79 N. Y. 102; *Bennett v. Buchan*, (1879) 76 N. Y. 386; *Cambridge Val. Bank v. Delano*, (1872) 48 N. Y. 326. And a person claiming a right or title under a conveyance or an instrument, in execution of a power or trust, is chargeable with notice of any infirmity in his title disclosed by the instrument under which he claims, or with which, by reasonable diligence, he would have become acquainted. The rule is adopted to determine the question of superior equities and to protect innocent persons from being defrauded. *Schwinger v. Hickok*, (1873) 53 N. Y. 280.

Parol proof of resulting trust.—A resulting trust may be proved by parol evidence. *Reid v. Fitch*, (1851) 11 Barb. 399.

Cited.—This section was cited in *Wood v. Robinson*, (1860) 22 N. Y. 564; *Reid v. Fitch*, (1851) 11 Barb. 399.

§ 96. Purposes for which express trusts may be created. An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

This section was derived from Real Property Law of 1896, § 76. The report of the Board of Statutory Consolidation (1907), page 4899, has the following note relating to this section: "After 1830 and prior to 1893 it is well known that the trustee of a charitable use or trust in this state was only the trustee of a power, and the legal title passed to heirs or devisees, subject to the power which overrode the legal estate. The reason for this was, that charitable uses were, after forty-three years of fierce litigation, held to be within the purview of the article of the Revised Statutes relating to uses and trusts, and the section on express trusts did not class charitable uses as express trusts. So they must, where tolerated, be classed as 'powers in trust.' Now that charitable uses are again permitted by L. 1893, Ch. 701, repeated in § 113 of this act (which act, the courts also hold, relieves charitable uses from the operation of our rule against perpetuities, except as to the time of vesting in possession) there is no reason why charitable uses and trusts, when to be performed by natural persons, should not be declared to be express trusts, so that the trustee may take and hold the legal title to real property within the limits allowed by law. These amendments enable the courts to deal with the trustees of charitable uses, without the necessity of making the heirs and devisees of the donor, or a person holding the naked title, parties to a judicial proceeding in which they no longer have any interest. The reform proposed by this amendment is orderly, but in no way affects legal or equitable rights of any person, and there need be no hesitancy on that score in adopting it. There is now no real difference between the trustee of an express trust and the trustee of a 'power in trust,' except the sometimes inconvenient one in respect of his legal title."

I. Generally, 117

II. Trust to sell for benefit of creditors, 121

III. Trust to sell, etc., for benefit of annuitants, etc., 122

IV. Trust in rents and profits for life, etc., 123

V. Accumulation of rents and profits, 125

I. GENERALLY

When authorized trust valid as a power: see *infra*, § 99.

Interest remaining in grantor of express trust: see *infra*, § 102.

What trust interest under an express trust may be alienated: see *infra*, § 103.

When trustee may convey, exchange or lease trust property: see *infra*, §§ 105, 106.

When estate of trustee ceases: see *infra*, § 109.

Express trusts not to descend: see *infra*, § 111.

Resignation or removal of trustee of express trust and appointment of successor: see *infra*, § 112.

General and special powers in trust: see *infra*, §§ 137, 138.

Trustee of express trust to have full estate: see *infra*, § 100.

When trust rests in Supreme Court: see PERSONAL PROPERTY LAW, § 20.

Spendthrift trusts: see notes, 3 Ann. Cas. 588, 1010; 18 Ann. Cas. 221, 495; 19 Ann. Cas. 273; 2 L. R. A. (N. S.) 443; 12 L. R. A. (N. S.) 369; 40 L. R. A. (N. S.) 1215; L. R. A. 1917A 989.

Purpose and scope of section.—The object of the section was to make provision for the maintenance of infants, married women and improvident persons. The opinion prevalent at the time of the enactment of the Revised Statutes was that a trust could be created only for the benefit of beneficiaries of that character, but the law was finally settled otherwise, and a trust can now be created for the benefit of any person. *Schenck v. Barnes*,

(1898) 25 App. Div. 153, 49 N. Y. S. 222, affirmed (1898) 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395. See also *Gott v. Cook*, (1839) 7 Paige 521. The section made no new express trusts; it merely classified and grouped together, calling them express trusts, such subjects and purposes as required the person charged with the execution of those purposes to have a title and estate in the land to be affected. Every other agency or control or authority over land, which did not require that a title or estate should vest in the person to whom that authority was given, was put into the category of simple powers in trust. To use the language of the revisers of the Revised Statutes: "The object of the revisers in this section is to allow the creation of express trusts in those cases, and in those cases only, where the purposes of the trust require that the legal estate should pass to the trustees." *Becker v. Becker*, (1897) 13 App. Div. 342, 43 N. Y. S. 17. But, although the section provides for only four express trusts, since the passage of chapter 701 of the Laws of 1893 (section 113 of the Real Property Law) a trust for religious, educational, charitable or benevolent uses has been referred to as the fifth express trust authorized by law. *Decker v. Vreeland*, (1917) 220 N. Y. 326, 115 N. E. 989, reversing 170 App. Div. 234, 156 N. Y. S. 442. And while it is true that all express trusts are abolished except those enumerated in the section, yet it has not stripped the owners of property of the power to impress upon their estates limitations possessing the characteristics of trusts. Trust limitations, if lawful, may be effectuated as powers in trust. *Reynolds v. Denslow*, (1894) 80 Hun 359, 30 N. Y. S. 77. See also *Beekman v. People*, (1858) 27 Barb. 260, affirmed (1861) 23 N. Y. 298, 80 Am. Dec. 269; *Yates v. Yates*, (1850) 9 Barb. 324; *Campbell v. Low*, (1850) 9 Barb. 585. But an unsuccessful attempt to create an express trust for a purpose specified in the section does not create a power in trust. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570.

Distinction between express trusts and powers in trust.—The distinction between express trusts and powers in trust is that in the former the trustee takes the legal title, which does not pass to the trustee of a power. *Cooke v. Platt*, (1885) 98 N. Y. 35; *Embury v. Sheldon*, (1877) 68 N. Y. 227; *Moore v. Appleby*, (1885) 36 Hun 368, affirmed (1888) 108 N. Y. 237, 15 N. E. 377; *Train v. Davis*, (1906) 49 Misc. 162, 98 N. Y. S. 816, affirmed 116 App. Div. 917.

Necessary elements of express trust.—To the constitution of every express trust there are essential these elements, namely, a trustee, an estate devised to him, and a beneficiary. The trustee and the beneficiary must be distinct personalities, or, otherwise, there could be no trust, and the merger of interests in the same person would effect a legal estate in him, of the same duration as the beneficial interest. *Greene v. Greene*, (1891) 125 N. Y. 506, 26 N. E. 739, 21 A. S. R. 743, affirming 54 Hun 93, 7 N. Y. S. 284. See also *Holland v. Alcock*, (1888) 108 N. Y. 312, 16 N. E. 305, 2 A. S. R. 420, reversing 40 Hun 372; *Crooke v. County of Kings*, (1884) 97 N. Y. 421; *Jessup v. Witherbee Real Estate, etc., Co.*, (1909) 63 Misc. 649, 117 N. Y. S. 276. So, the transfer of property by a declaration of trust depends upon the same facts that are necessary to create a valid gift *inter vivos*, except that it is not essential that the property should be delivered to the *cestui que trust* or that he should be informed of the trust. The donor or creator of the trust must have relinquished all ownership of the property. He must absolutely part with the beneficial interest. If he reserves any control of the property, it can only be as trustee or representative of the *cestui que trust*. *Matter of George*, (1889) 1 Connoly 241, 23 Abb. N. Cas. 43, 3 N. Y. S. 426.

Words and terms necessary to constitute a trust.—Particular words, and least of all the specific word "trust," are not necessary to create a trust under this section, but to accomplish that result there must be either an explicit declaration of trust or circumstances which show beyond reasonable doubt that a trust was intended to be created, and that the trustee is intended to be clothed with the legal title. *Title Guarantee, etc., Co. v. Haven*, (1915) 214 N. Y. 468, 108 N. E. 819, reversing 154 App. Div. 652, 139 N. Y. S. 207; *Beaver v. Beaver*, (1889) 117 N. Y. 421, 22 N. E. 940, 15 A. S. R. 531, 6 L. R. A. 403, reversing 53 Hun 258, 6 N. Y. S. 586. See also *Steinhardt v. Cunningham*, (1891) 130 N. Y. 292, 29 N. E. 100, affirming 55 Hun 375, 8 N. Y. S. 627; *Morse v. Morse*, (1881) 85 N. Y. 53; *Vernon v. Vernon*, (1873) 53 N. Y. 351,

modifying 7 Lans. 492; *Dillaye v. Greenough*, (1871) 45 N. Y. 438; *Grems v. Parsons*, (1914) 149 N. Y. S. 577; *Mesereau v. Bennet*, (1908) 124 App. Div. 413, 108 N. Y. S. 868; *Mullins v. Mullins*, (1894) 79 Hun 421, 29 N. Y. S. 961; *Degraw v. Clason*, (1844) 11 Paige 136. Neither is it necessary that the trust be stated in the very words of the statute. It is sufficient if a purpose within the statute is clearly embraced in the language used. *Donovan v. Van De Mark*, (1879) 78 N. Y. 244, reversing 18 Hun 200; *Fenton v. Fenton*, (1901) 35 Misc. 479, 71 N. Y. S. 1083; *Peirson v. Van Bergen*, (1898) 23 Misc. 547, 52 N. Y. S. 890. And the general rule is that words sufficient to constitute an express trust authorized by statute should be given that effect. *Close v. Farmers' Loan, etc., Co.*, (1909) 195 N. Y. 92, 87 N. E. 1005, affirming 121 App. Div. 528, 106 N. Y. S. 329; *Steinway v. Steinway*, (1900) 163 N. Y. 183, 57 N. E. 312, affirming 24 App. Div. 104, 48 N. Y. S. 1046. But an intent to create an express trust will not be presumed in the absence of an express declaration to that effect, nor will a trust be implied where it would render a will illegal and void. *Greene v. Greene*, (1891) 125 N. Y. 506, 26 N. E. 739, 21 A. S. R. 743, affirming 54 Hun 93, 7 N. Y. S. 284; *Heermans v. Robertson*, (1876) 64 N. Y. 332, affirming 3 Hun 464, 5 Thomp. & C. 596. See also *Wald v. Weilhamer*, (1913) 82 Misc. 455, 144 N. Y. S. 929. While power given to testamentary trustees to terminate the trust as a whole would, standing alone, carry the right to terminate the trust in part, the question is one of intent and must be determined with reference to the other provisions of the will of which the provision in question is a component part. *In re Columbia Trust Co.*, (1916) 97 Misc. 566, 163 N. Y. S. 536.

Creation of trust by parol.—No trust can be created or declared in land except by an instrument in writing. *Follett v. Badeau*, (1882) 26 Hun 253. But it has been held that a trust may be proved by parol evidence. *Reid v. Fitch*, (1851) 11 Barb. 399.

Unauthorized trust.—A trust for a purpose not authorized by statute becomes eo instanti a passive or naked trust, under which title at once vests in the beneficiary. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158. See also *Kondolf v. Britton*, (1914) 160 App. Div. 381, 145 N. Y. S. 791; *Shuler v. Shuler*, (1910) 137 App. Div. 515, 121 N. Y. S. 869, reversing 63 Misc. 604, 118 N. Y. S. 629; *Hamilton v. Hamilton*, (1909) 135 App. Div. 454, 119 N. Y. S. 986, reversing 63 Misc. 533, 118 N. Y. S. 588; *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 416; *Matter of Bleckwehl*, (1913) 80 Misc. 468, 142 N. Y. S. 449; *Washburn v. Acome*, (1911) 74 Misc. 301, 131 N. Y. S. 963, affirmed 151 App. Div. 948; *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570; *Rogers v. De Forest*, (1838) 7 Paige 272; *Hagerty v. Hagerty*, (1876) 9 Hun 175. Thus a devise to an executor in trust, which does not authorize him to collect the rents and profits but gives to the life beneficiary the same right to occupy the lands devised that he would enjoy if he possessed the legal estate, is a dry and passive trust and not one of the permissible trusts, but the title to the lands devised vests in the beneficiaries; and a provision that in certain events the executor shall rent a part of the premises and apply the rents as directed does not divest the title of the life tenants, nor create a trust, but is valid as a power in trust. *Matter of England*, (1910) 69 Misc. 523, 127 N. Y. S. 881.

Trustee's interest.—The rule at common law, as well as by the statute, is that the trustee takes that quantity of interest only which the purposes of the trust require and the instrument creating it permits. *Nicoll v. Walworth*, (1847) 4 Denio 385. And a trustee takes no estate in the land not embraced in the trust. *In re L'Honnemieu*, (1905) 138 Fed. 606, modified and affirmed 146 Fed. 708, 77 C. C. A. 134; *Stevenson v. Lesley*, (1877) 70 N. Y. 512, modifying 9 Hun 637; *Embury v. Sheldon*, (1877) 68 N. Y. 227; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492.

Failure to name trustee.—Where an express trust is in all respects valid, there being only the failure to name a trustee, a court of equity will supply such defect. *McDougall v. Dixon*, (1897) 19 App. Div. 420, 46 N. Y. 280.

Trust for partition of lands.—The statute does not authorize the creation of a trust for the partition of lands. But a power may be created for that purpose and such a devise to executors, though void as a trust, may be valid as a power to divide and distribute. *Cooke v. Platt*, (1885) 98 N. Y. 35;

Palmer v. Marshall, (1894) 81 Hun 15, 30 N. Y. S. 567. See also *McLean v. McLean*, (1892) 66 Hun 631 mem., 21 N. Y. S. 326.

Separation of trusts.—Where several trusts are created and among them one or more which render the disposition illegal and these can be separated without doing injustice or defeating the will of the testator, that which is illegal, or which added to the others renders the whole illegal, may be cut off and the others may stand, thus giving the intention of the testator effect as far as possible. *Underwood v. Curtis*, (1891) 127 N. Y. 523, 28 N. E. 585. See also *Cullross v. Gibbons*, (1892) 130 N. Y. 447, 29 N. E. 839; *Bascom v. Weed*, (1907) 53 Misc. 496, 105 N. Y. S. 459.

Inalienability of trust estates.—In this state trust estates are inalienable by force of statute, although there is nothing in the nature of such an estate which makes them inalienable *ipso facto*. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282.

Trust to secure payment of annual sum.—In *Calkins v. Long*, (1855) 22 Barb. 97, a trust created by a husband for the support and maintenance of his wife was held to be a valid trust, and sufficient to uphold a mortgage given by him to a trustee to secure payment of a specified sum annually for her support.

Testamentary trustee.—To constitute a testamentary trustee it is necessary that some express trust be created by the will, and merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is, in a general sense, a trustee, for he deals with the property of others confided to his care, but he is not a trustee in the sense in which that term is used in courts of equity and in the statutes. *Matter of Hawley*, (1887) 104 N. Y. 250, 10 N. E. 352.

Trust mortgages.—It has been held that the statutes regulating trusts in land have no application to mortgage securities, although a mortgage in trust to secure bonds of the mortgagor is valid. *King v. Merchants' Exch. Co.*, (1851) 5 N. Y. 547.

Charging of debts or legacies on land.—The charging of the payment of legacies or debts upon lands creates no trust. *Dill v. Wisner*, (1882) 88 N. Y. 153; *Livingston v. Gordon*, (1881) 84 N. Y. 136; *Gifford v. Rising*, (1889) 51 Hun 1, 3 N. Y. S. 392.

Power of sale.—It is essential to the constitution of a valid trust for either of the purposes of the section, that the power of sale conferred upon the trustees must be absolute and imperative, without discretion, except as to the time and manner of performing the duty imposed, and that it is not sufficient to invest the trustee with a merely discretionary power of sale, which he may or may not exercise at his option, and which does not operate as a conversion. The sale or other disposition mentioned in the statute must be the direct and express purpose of the trust. *Cooke v. Platt*, (1885) 98 N. Y. 35. See also *Steinhardt v. Cunningham*, (1891) 130 N. Y. 292, 29 N. E. 100, affirming 55 Hun 375, 8 N. Y. S. 627. Where testamentary trustees are given a power of sale a valid trust may be created for the application of both the income and principal of real property for such proper and comfortable maintenance and support of the beneficiaries as may seem reasonable to the trustees. *Donlin v. Hynes*, (1917) 177 App. Div. 184, 163 N. Y. S. 868.

Suspension of power of alienation.—The statute in this state settles the question beyond controversy that there can be no suspension of the power of alienation beyond two lives in being, and the reported cases are numerous which uphold this rule (see *supra*, § 42 note). *Hobson v. Hale*, (1884) 95 N. Y. 588. The mere creation of a trust does not, *ipso facto*, suspend the power of alienation. It is only suspended where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the nonaction of the trustee, or, in consequence of a discretion reposed in him, by the creator of the trust. *Robert v. Corning*, (1882) 89 N. Y. 225, affirming 23 Hun 299. The statute against perpetuities deals only with the trust term, the duration of the trust, or the lawful suspension of the power of alienation. It sets up a simple and easy standard by which to measure the permitted limit, and that is a period extending beyond not more than two lives in being at the creation of the trust. *Crooke v. Kings County*, (1884)

97 N. Y. 421. See also *Stringer v. Young*, (1908) 191 N. Y. 157, 83 N. E. 690, modifying 110 App. Div. 37, 96 N. Y. S. 1052; *Nester v. Nester*, (1910) 68 Misc. 207, 118 N. Y. S. 1009, 124 N. Y. S. 974. Thus, a suspension during the minority of a designated individual and a further suspension during the life of the same person does not in legal effect differ from a single suspension in the first instance during the life of that person. *Benedict v. Webb*, (1885) 98 N. Y. 460. See also *Genet v. Hunt*, (1889) 113 N. Y. 158, 21 N. E. 91. But a trust term measured by three lives in being instead of two, as provided by the statute, renders the trust void, and creates an intestacy as to all the property attempted to be disposed of thereby. *Hooker v. Hooker*, (1901) 166 N. Y. 156, 59 N. E. 769, reversing 41 App. Div. 235, 58 N. Y. S. 536.

Rule as to vesting of estates.—While the general rule favors the vesting of estates it was adopted by courts as a guide to the probable intention of testators and is never applied when that intention, as gathered from the entire will, is that the estate should not vest. *Lewisohn v. Henry*, (1904) 179 N. Y. 352, 72 N. E. 239, affirming 92 App. Div. 532, 87 N. Y. S. 325; *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5.

Procedure.—"Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Code Civ. Pro., § 449. See also *Mutual Life Ins. Co. v. Nicholas*, (1911) 144 App. Div. 95, 128 N. Y. S. 902.

Cited.—This section was cited in dissenting opinion by Ingraham, J., in *Newton v. Hunt*, (1909) 134 App. Div. 325, 119 N. Y. S. 3, affirmed (1911) 201 N. Y. 599 mem.; *Higgins v. Downs*, (1905) 101 App. Div. 119, 91 N. Y. S. 937; *Cutler v. Winberry*, (1916) 160 N. Y. S. 712; *Tredwell v. Tredwell*, (1914) 86 Misc. 104, 148 N. Y. S. 391; *Deegan v. Van Glahn*, (1894) 75 Hun 39, 26 N. Y. S. 989, affirmed without opinion (1895) 144 N. Y. 573, 39 N. E. 692; *McArthur v. Gordon*, (1889) 51 Hun 511, 4 N. Y. S. 584, modified and affirmed (1891) 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667; *Cooper v. Whitney*, (1842) 3 Hill 95; *Haxtum v. Corse*, (1848) 2 Barb. Ch. 506.

II. TRUST TO SELL FOR BENEFIT OF CREDITORS

General assignments for benefit of creditors: see DEBTOR AND CREDITOR LAW, § 3 et seq.

Commissions of trustee under trust deed to sell property for benefit of creditors: see *infra*, § 117.

Trusts for insolvent and imprisoned debtors: see DEBTOR AND CREDITOR LAW, § 160 et seq.

Termination of trust for benefit of creditors: see *infra*, § 110.

Necessary elements to sustain trust.—To sustain a trust as creating an express trust to sell lands for the benefit of creditors, it must appear that this was the primary or sole purpose of the grant, and the duty of the grantee to sell for the benefit of the creditors must be imperative. *Woez v. Rademacher*, (1890) 120 N. Y. 62, 23 N. E. 1113.

Assignee as trustee.—A general assignment for the benefit of creditors makes the assignee the trustee of an express trust, and vests the title in him, subject only to the execution of the trust. *Northam v. Dutchess County Mut. Ins. Co.*, (1901) 166 N. Y. 319, 59 N. E. 912, 82 A. S. R. 655, reversing 51 App. Div. 618, 64 N. Y. S. 1144; *Brown v. Guthrie*, (1888) 110 N. Y. 435, 18 N. E. 254, reversing 39 Hun 29; *People v. Bacon*, (1885) 99 N. Y. 275, 2 N. E. 4; *Paddell v. Janes*, (1914) 84 Misc. 212, 145 N. Y. S. 868; *Flint v. Bell*, (1882) 27 Hun 155, affirmed without opinion (1886) 101 N. Y. 688. And a trustee in bankruptcy is a trustee of an express trust. *Cole v. Manson*, (1903) 42 Misc. 149, 85 N. Y. S. 1011.

Trust to lease, mortgage or sell.—An express trust to lease or mortgage the estate assigned for the benefit of creditors, is not authorized by the statute; and where the estate is assigned to the trustee upon such an unauthorized trust no estate whatever vests in the trustee under the assignment. *Rogers v. De Forest*, (1838) 7 Paige 272. But while the subdivision does not authorize

the mortgaging of lands by an assignee to raise money to pay creditors, it contains nothing which prevents a debtor or the grantee of a debtor, in pursuance of a prior oral understanding entered into at the time of the execution of the conveyance to him, from executing a mortgage to secure the payment of specific debts. *Royer Wheel Co. v. Fielding*, (1886) 101 N. Y. 504, 5 N. E. 431; reversing 31 Hun 274. And it has been held that a trust to sell lands and divide the proceeds among the cestuis que trustent as beneficiary owners and not as creditors, is void as a trust but valid as a power in trust. *Selden v. Vermilyea*, (1847) 1 Barb. 58.

Retention of interest by grantor.—There is a clear and well-recognized distinction between an absolute deed of trust which places the property beyond the control of the grantor, and a deed of trust as security in the nature of a mortgage, in which case an equity of redemption is reserved to the grantor, for in the one case the conveyance is unconditional and indefeasible, although for the purpose of raising a fund to pay debts, and in the other it is for the purpose of securing debts, and is, therefore, defeasible. *Dryer v. Hopper*, (1914) 162 App. Div. 590, 147 N. Y. S. 1028. Thus, an insolvent or even a solvent debtor cannot convey all his property to trustees to pay a portion of his creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for, as such a conveyance ties up his property in the hands of his trustees, places it beyond the reach of his creditors by the ordinary process of the law and thus hinders and delays them, and is, therefore, void as to the creditors unprovided for. *Knapp v. McGowan*, (1884) 96 N. Y. 75. And the statute cannot be invoked by a debtor "to protect a trust which he has created to serve in time of need as a refuge from his creditors." Thus, a person cannot place his property in trust, with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arise after the creation of the trust. *Schenck v. Barnes*, (1898) 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395, affirming 25 App. Div. 153, 49 N. Y. S. 222. See also *Degraw v. Clason*, (1844) 11 Paige 136; *Hallett v. Thompson*, (1836) 5 Paige 583.

When trust not liable to execution.—A trust in lands created by a person other than the debtor and designed for the support of the debtor is not liable to execution, and can be reached in equity only where there is a surplus. *Salsbury v. Parsons*, (1885) 36 Hun 12.

III. TRUST TO SELL, ETC., FOR BENEFIT OF ANNUITANTS, ETC.

Purpose.—The evident intention of the subdivision was the creation of a trust to sell land and receive the proceeds thereof for the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying any charge thereon, to mortgage land and receive the proceeds thereof for the benefit of legatees or for the purpose of satisfying any charge thereon, and to lease lands for a given sum which the trustee is to receive for the benefit of legatees, or for the purpose of satisfying any charge on said land, the fee of the land descending. *Cowen v. Rinaldo*, (1894) 82 Hun 479, 31 N. Y. S. 554.

Trustee's title.—Where, under subdivision 2, a valid trust is created, title to the property vests in the trustee, subject only to the execution of the trust. *Kelley v. Hoey*, (1898) 35 App. Div. 273, 55 N. Y. S. 94; *Corse v. Leggett*, (1857) 25 Barb. 389; *Sedgwick v. Stanton*, (1854) 18 Barb. 473, affirmed (1856) 14 N. Y. 289. And a devise to executors, in trust to sell for the benefit of legatees, vests title for the purposes of the execution of the trust in them as trustees. *Stewart v. Hamilton*, (1885) 37 Hun 19.

Trust to sell.—A trust to sell is valid only where the sale is to be made for the benefit of creditors or legatees, or for the purpose of satisfying a charge upon the land; and where such is not the purpose the trust fails. *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570. And an authority to executors to sell lands for the purpose of paying debts and legacies constitutes them trustees of an express trust. *Wood v. Brown*, (1866) 34 N. Y. 337. Nor does the fact that the sale is for the benefit of a sole legatee or for that of several legatees affect the validity of the trust. *Skinner v. Quin*, (1870) 43 N. Y. 99. But it has been held that a duty placed upon executors to sell and distribute does not create a trust under the subdivision, but only

a power under section 97. *Matter of Callahan*, (1916) 96 Misc. 74, 159 N. Y. S. 942, affirmed 176 App. Div. 534, affirmed (1917) 220 N. Y. 774 mem.

Trust to lease.—Where executors are expressly authorized until a sale is made "to lease or let the same or any part thereof for such terms as they shall see fit," they are empowered by implication to take the rents and profits until a sale is made, and an express trust is thus created. *Russell v. Hilton*, (1903) 80 App. Div. 178, 80 N. Y. S. 563, affirmed without opinion (1903) 175 N. Y. 525, 67 N. E. 1089.

Trust to lease property to pay mortgages.—The authority to create an express trust to "lease," as well as sell or mortgage real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon, conferred by subdivision 2 of this section, does not authorize the creation of an express trust by will empowering the trustee to take the rents and profits of land and apply them, or part of them, during the lifetime of an annuitant to the payment of mortgages, as this would decrease the burden upon the trust estate and thereby increase the capital thereof in violation of the provisions which prohibit the accumulation of the rents and profits except during the minority and for sole benefit of minors. *Hascall v. King*, (1900) 162 N. Y. 134, 56 N. E. 515, 76 A. S. R. 302, modifying 28 App. Div. 280, 51 N. Y. S. 73. See also *Lowenhaupt v. Stanisics*, (1904) 95 App. Div. 171, 88 N. Y. S. 537. But it has been held that a trust to pay charges or incumbrances on land out of the rents, issues and profits of a trust term, properly limited as to duration, is valid. *Becker v. Becker*, (1897) 13 App. Div. 342, 43 N. Y. S. 17.

Trust to mortgage.—A trust to mortgage, where the mortgage is not for the benefit of legatees or for the purpose of satisfying any charge upon the land, is invalid. *Weeks v. Cornwell*, (1887) 104 N. Y. 325, 10 N. E. 431.

IV. TRUST IN RENTS AND PROFITS FOR LIFE, ETC.

Necessity of power to receive rents and profits.—The power to receive the rents and profits for some of the purposes mentioned in this subdivision is requisite to constitute a valid trust thereunder. *Lewis v. Howe*, (1901) 64 App. Div. 572, 72 N. Y. S. 851, affirmed (1903) 174 N. Y. 340, 66 N. E. 975, 1101; *Leggitt v. Perkins*, (1849) 2 N. Y. 297; *Cassagne v. Marvin*, (1888) 48 Hun 619 mem., 1 N. Y. S. 590; *Purdy v. Wright*, (1887) 44 Hun 239, 8 N. Y. St. Rep. 24; *Jarvis v. Babcock*, (1849) 5 Barb. 139; *Hawley v. James*, (1836) 16 Wend. 61; *Boynton v. Hoyt*, (1845) 1 Denio 53. But in order to receive the rents, issues and profits, the trustee must be entitled to the possession and to control and manage the property. *Salsbury v. Parsons*, (1885) 36 Hun 12. A direction to pay over rents and profits is equivalent to a direction to apply them to the use of a beneficiary, and creates a valid trust within the meaning of the subdivision. *Marx v. McGlynn*, (1882) 88 N. Y. 357. See also *Moore v. Hegeman*, (1878) 72 N. Y. 376; *Vernon v. Vernon*, (1873) 53 N. Y. 351, modifying 7 Lans. 492; *Leggitt v. Perkins*, (1849) 2 N. Y. 297; *Fellows v. Heermans*, (1870) 4 Lans. 250. Thus a devise of the use and income of all a testator's real and personal property to his wife, to be paid to her by his executors so long as she remains his widow, creates a valid trust. *Doscher v. Wyckoff*, (1909) 132 App. Div. 139, 116 N. Y. S. 389, affirming 63 Misc. 414, 113 N. Y. S. 655. See also *Putnam v. Lincoln Safe Deposit Co.*, (1908) 191 N. Y. 166, 83 N. E. 789, reversing 118 App. Div. 468, 104 N. Y. S. 4; *Campbell v. Low*, (1850) 9 Barb. 585. But where a testator attempted to devise real estate used as a manufacturing establishment, to the executor in trust to continue the factory in operation for two lives in being, and upon the death of the survivor of them to sell the same, the income of the property and the proceeds after its conversion to be distributed to one unincorporated association and three corporations, for religious and charitable purposes, it was held that the provision failed as a trust to receive and apply the rents and profits of real estate, because the lives on which the trust depended were those of persons having no interest in its performance, while the statute requires it to be dependent upon the life of the beneficiary. *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290.

Words necessary to constitute valid trust.—To constitute a valid express trust, or to authorize the receipt by the executors of the rents and profits, it is not necessary that the purpose shall be stated in the precise words of

the statute or that the power to receive the rents and profits should be given to him in so many words. It is sufficient if there may be implied from the whole devise, taken together, an intention that the executor shall receive the rents and profits, and, therefore, that the trust shall be created. *Hubbard v. Housley*, (1899) 43 App. Div. 129, 59 N. Y. S. 392, affirmed without opinion (1899) 160 N. Y. 688, 55 N. E. 1096. See also *Morse v. Morse*, (1881) 85 N. Y. 53; *Nichols v. Nichols*, (1904) 42 Misc. 381, 86 N. Y. S. 719; *Purdy v. Wright*, (1887) 44 Hun 239, 8 N. Y. St. Rep. 243. Thus a direction to "hold and invest the share of each of such minor or minors, and to receive and collect the interest and income arising therefrom and to apply the same toward his, her or their education and support until each respectively shall reach the age of twenty-one years," creates an express trust to receive rents, issues and profits of the property devised and apply the same to the use of the minors. *Robinson v. Adams*, (1903) 81 App. Div. 20, 80 N. Y. S. 1098, affirmed without opinion (1904) 179 N. Y. 558, 71 N. E. 1139.

Trustee's title.—An express trust providing for the receipt by trustees of the rents, profits or income of lands and the payment of the same over to beneficiaries during their lives, vests title in the trustees to the lands embraced within the trust. *Lahey v. Kortright*, (1892) 132 N. Y. 450, 30 N. E. 989; *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805; *Marvin v. Smith*, (1871) 46 N. Y. 571, affirming 56 Barb. 600; *Leggett v. Perkins*, (1849) 2 N. Y. 297. See also *Skinner v. Quin*, (1871) 43 N. Y. 99; *Leggett v. Hunter*, (1859) 19 N. Y. 445, affirming 25 Barb. 81; *Savage v. Burnham*, (1858) 17 N. Y. 561; *Belmont v. O'Brien*, (1855) 12 N. Y. 394; *Ullman v. Cameron*, (1904) 92 App. Div. 91, 87 N. Y. S. 148; *Thompson v. Hart*, (1901) 58 App. Div. 439, 69 N. Y. S. 223, affirmed without opinion (1901) 169 N. Y. 571, 61 N. E. 1135; *Horsfield v. Black*, (1899) 40 App. Div. 264, 57 N. Y. S. 1006; *Roberts v. Cary*, (1895) 84 Hun 328, 32 N. Y. S. 563; *McLean v. McLean*, (1892) 66 Hun 631 mem., 21 N. Y. S. 326; *Richards v. Crocker*, (1892) 66 Hun 629 mem., 20 N. Y. S. 954, affirmed without opinion (1894) 143 N. Y. 631, 37 N. E. 827; *Matter of McCaffrey*, (1888) 50 Hun 371, 3 N. Y. S. 96; *Nicoll v. Walworth*, (1847) 4 Denio 385. And the authorities are abundant to establish the proposition that authority to lease, rent, repair, insure, pay taxes, assessments and interest, and pay net income to devisees carries the legal title to executors in such cases and creates a trust in them, valid under the statute. *Tobias v. Ketchum*, (1865) 32 N. Y. 319, reversing 36 Barb. 304; *Weir v. Barker*, (1905) 104 App. Div. 112, 93 N. Y. S. 732. Thus, a devise to executors of a certain sum of money to invest the same and to pay over the income creates an express trust and clothes them with the legal title to the fund. *Maitland v. Baldwin*, (1893) 70 Hun 267, 24 N. Y. S. 29. See also *Bray v. O'Rourke*, (1903) 89 App. Div. 400, 85 N. Y. S. 907.

General devise to sell and convey.—A general devise of lands in trust to executors, to sell and convey, vests no title in them as trustees, and creates no valid trust under the section. *Chamberlain v. Taylor*, (1887) 105 N. Y. 185, 11 N. E. 625; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Adams v. Perry*, (1871) 43 N. Y. 487; *Coann v. Colver*, (1907) 188 N. Y. 9, 80 N. E. 362, reversing 108 App. Div. 360, 95 N. Y. S. 1122; *Stevens v. Fogle*, (1911) 73 Misc. 517, 130 N. Y. S. 1082; *Matter of Murray*, (1908) 124 App. Div. 548, 108 N. Y. S. 1047. It has been held that where a will created a valid trust, but contained no power of sale which enabled the trustee to convey, he could not destroy the trust by uniting with the beneficiary in a conveyance of the trust property. *Priessenger v. Sharp*, (1891) 59 Super. Ct. 315, 14 N. Y. S. 372. But where trustees are empowered to sell real estate and to invest the proceeds for the uses and purposes authorized by the subdivision a valid trust is created. *McKinlay v. Van Dusen*, (1902) 76 App. Div. 200, 78 N. Y. S. 377. See also *Walter v. Tomkins*, (1902) 71 App. Div. 21, 75 N. Y. S. 557, affirmed (1904) 179 N. Y. 555 mem.

Power to mortgage.—Where a will directed executors to "use and apply" real estate to the support of a son for and during the term of his natural life, with authority to sell and convey for the purpose of carrying out the trust, it was held that the executors had no power to mortgage the property in order to obtain funds for the support of the son. *Potter v. Hodgman*, (1903) 81 App. Div. 233, 80 N. Y. S. 1056, affirmed without opinion (1904) 178 N. Y. 580, 70 N. E. 1107.

Trust for payment of annuities.—Under subdivision 3, authorizing the creation of an express trust "to receive the rents and profits of land and apply

them to the use of any person," such a trust may be created for the payment of annuities. *Cochrane v. Schell*, (1894) 140 N. Y. 516, 35 N. E. 971, affirming 64 Hun 576, 19 N. Y. S. 424. See also *Matter of United States Trust Co.*, (1914) 86 Misc. 603, 148 N. Y. S. 762, affirmed 168 App. Div. 903, affirmed (1915) 216 N. Y. 639 mem.; *People's Trust Co. v. Flynn*, (1905) 106 App. Div. 78, 94 N. Y. S. 436; *Matter of Cole*, (1916) 174 App. Div. 534, 161 N. Y. S. 120, affirmed (1916) 219 N. Y. 435; *Buchanan v. Little*, (1897) 154 N. Y. 147, 47 N. E. 970, modifying 6 App. Div. 527, 39 N. Y. S. 671; *Lang v. Ropke*, (1852) 5 Sandf. 363. And an annuity, when created by a will, is a legacy, and when payable out of rents and profits is a charge upon the land. *Griffen v. Ford*, (1857) 1 Bosw. 123.

Trust for unborn issue.—It has been held that the beneficiaries or legatees under a trust created under the subdivision may be unborn issue, as well as persons in being and named in the instrument creating it; regard being always had to the rule respecting perpetuities. *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492.

Alienability of trust.—A valid trust created under this subdivision is inalienable. *Tucker v. Tucker*, (1851) 5 N. Y. 408; *Belmont v. O'Brien*, (1855) 12 N. Y. 394; *Butler v. Bandouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121; *McNabor v. Marks*, (1906) 51 Misc. 207, 99 N. Y. S. 960; *Degraw v. Clason*, (1844) 11 Paige 136. But it has been said that it is only a trust to accumulate rents and profits of land and apply them to the use of a person generally, for the benefit of one or more infants, which renders the estate inalienable. *Radley v. Kuhn*, (1884) 97 N. Y. 26, modifying and affirming 28 Hun 573.

Effect of section 1391, Code Civil Procedure.—The effect of section 1391 of the Code of Civil Procedure is to permit certain creditors of beneficiaries of trusts created under the third subdivision of the section to have execution on their judgments. *Brearley School v. Ward*, (1911) 201 N. Y. 358, 94 N. E. 1001, 1912B 251, 40 L. R. A. (N. S.) 1215, affirming 138 App. Div. 833, 123 N. Y. S. 614.

V. ACCUMULATION OF RENTS AND PROFITS

Accumulations: see *supra*, § 61.

Accumulations of income.—Accumulations of income can only be done for the benefit of minors and must terminate with the expiration of their minority. *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58; *Matter of Snyder*, (1901) 35 Misc. 588, 72 N. Y. S. 61; *Bean v. Hockman*, (1859) 31 Barb. 78. But it has been held that a void direction for accumulation will not invalidate the gift or devise of the principal, which, if valid, may stand without the accumulation. *Hascall v. King*, (1900) 162 N. Y. 134, 56 N. E. 515, 76 A. S. R. 302, modifying 28 App. Div. 280, 51 N. Y. S. 73; *Tobin v. Graf*, (1902) 39 Misc. 412, 80 N. Y. S. 5.

Accumulations to pay mortgages.—A direction in a will for the application of a stated percentage of the net income of the trust estate to the discharge of mortgages on real estate forming a part thereof is invalid, not only for the reason that it attempts to set up a trust for a purpose prohibited by statute, but also because it involves an accumulation of income for a purpose not permitted. *Matter of Fisher*, (1893) 4 Misc. 46, 25 N. Y. S. 79.

§ 97. Certain devises to be deemed powers. A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

This section was derived from Real Property Law of 1896, § 77.

Execution of power to dispose by devise: see *infra*, § 167.

When devise operates as execution of power: see *infra*, § 176.

Scope of power.—The statute does not enumerate or define the acts which may be done under a power, as in the case of trusts, and they are practically unlimited. They may be created for any lawful purpose by any language which indicates an intention to bestow them, and to do any act which the grantor might himself lawfully perform. *Reynolds v. Denslow*, (1894) 80 Hun 359, 30 N. Y. S. 77. But in order to create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be accomplished by its execution shall be specified in or clearly ascertainable from the instrument by which the power is attempted to be created. *Sweeney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575. So, although the provisions of a will may be inoperative to create a valid express trust under the statute yet the power therein conferred may still be exercised as a power in trust, but in that event it is also expressly provided that the title shall descend to the heirs at law, subject to the execution of the power. *Chamberlain v. Taylor*, (1887) 105 N. Y. 185, 11 N. E. 625; *Konvalinka v. Schlegel*, (1887) 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494, affirming 39 Hun 451; *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290. See also *Leonard v. Burr*, (1858) 18 N. Y. 96.

Words necessary to authorize receipt of rents and profits.—To authorize the receipt by executors of rents and profits, it is not necessary that the purpose shall be stated in the precise words of the statute or that the power to receive the rents and profits should be given to him in so many words. It is sufficient if there is to be implied from the whole devise, taken together, an intention that the executor shall receive the rents and profits. *Hubbard v. Housley*, (1899) 43 App. Div. 129, 59 N. Y. S. 392, affirmed without opinion (1899) 160 N. Y. 688, 55 N. E. 1096.

Naked power of sale.—A trust to sell is one of those authorized by the statute, but, if unaccompanied by the right to receive the rents and profits, it vests no estate in the trustees, though it is valid as a power. *Chamberlain v. Taylor*, (1887) 105 N. Y. 185, 11 N. E. 625; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348. See also *Clift v. Moses*, (1889) 116 N. Y. 144, 22 N. E. 393, affirming 44 Hun 312, 7 N. Y. St. Rep. 691; *Vernon v. Vernon*, (1873) 53 N. Y. 351, modifying 7 Lans. 492; *Crittenden v. Fairchild*, (1869) 41 N. Y. 289; *Turco v. Trimboli*, (1912) 152 App. Div. 431, 137 N. Y. S. 343; *Stevens v. Fogle*, (1911) 73 Misc. 417, 130 N. Y. S. 1083; *Fogarty v. Strange*, (1910) 72 Misc. 225, 129 N. Y. S. 610; *Foersch v. Schmitt*, (1907) 55 Misc. 608, 106 N. Y. S. 735; *Matter of Christie*, (1891) 59 Oun 153, 13 N. Y. S. 202, affirmed (1892) 133 N. Y. 473, 31 N. E. 515, 45 N. Y. St. Rep. 844; *Hoepfner v. Sevestre*, (1890) 56 Hun 640 mem., 10 N. Y. S. 51; *Purdy v. Wright*, (1887) 44 Hun 239, 8 N. Y. St. Rep. 243; *Germond v. Jones*, (1842) 2 Hill 569. The right to receive the income cannot be implied from the nature of the duties of the trustees. Even where there is an actual devise to the trustees no estate can vest in them unless they are also empowered to receive the rents and profits. *Matter of Bleckwehl*, (1913) 80 Misc. 468, 142 N. Y. S. 449; *Matter of England*, (1910) 69 Misc. 523, 127 N. Y. S. 881. So, while at law the rents and profits of land are incident to the possessory right and belong to the holder of the legal title, they may in equity belong to another. Where by a will a bare power of sale is given to executors, and the lands meanwhile descend to the heir, the latter is at law entitled to the intermediate rents and profits, but if the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund, and the heir may be compelled to account therefor to the executor. *Lent v. Howard*, (1882) 89 N. Y. 169.

Discretionary power of sale.—A merely discretionary power of sale in executors for purposes of distribution, even though connected with the right to receive the rents and profits, does not vest them with title to real estate. *Chamberlain v. Taylor*, (1887) 105 N. Y. 185, 11 N. E. 625; *Cooke v. Platt*, (1885) 98 N. Y. 35. See also *Matter of Arensberg*, (1907) 120 App. Div. 463, 104 N. Y. S. 1033.

Power to sell and distribute.—A duty placed upon executors to sell and distribute does not create a trust under section 96, subdivision 2, but only a power under this section. *Matter of Callahan*, (1916) 96 Misc. 74, 159 N. Y. S. 942, affirmed 176 App. Div. 906, affirmed (1917) 220 N. Y. 774 mem.

Power of sale as including power to exchange lands.—A will directing an executor to whom an undivided portion of lands held in common has been conveyed in trust to sell them in his discretion for cash, or on credit, or for part cash and part credit as he shall deem most to the advantage of the estate, creates a naked power in trust and the testator's interest in the lands passes upon his death to his heirs or devisees subject to the execution of the power. Under such power the executor may only make an actual sale for cash or credit, or part cash and part credit, and he has no authority to exchange the lands for other lands. *Turco v. Trimboli*, (1912) 152 App. Div. 431, 137 N. Y. S. 343.

Termination of power of sale.—Where under a will the trustees on the termination of the trust had no further authority to collect rents but merely to sell the corpus and distribute the same it was held that their legal title terminated at the expiration of the trust, and passed to the devisees subject to the execution of the power of sale by the trustees; and hence the power of sale could be terminated where the beneficiaries united in electing to take the property as real estate. *Van Cott v. Van Cott*, (1915) 167 App. Div. 694, 152 N. Y. S. 840.

Acts referred by section distinguished from leasing.—The failure to include the power to lease in this section presupposes that more than one single act is to be done by the trustee in the execution of a trust to lease, under which he must have an estate in the land to enable him to perform his duty. *Becker v. Becker*, (1897) 13 App. Div. 342, 43 N. Y. S. 17.

Trust to mortgage.—A trust to mortgage, where the mortgage was not for the benefit of legatees or to satisfy any charge upon the land, is invalid, and vests no estate in the trustees. *Weeks v. Cornwell*, (1887) 104 N. Y. S. 325, 10 N. E. 431. See also *Potter v. Hodgman*, (1903) 81 App. Div. 233, 80 N. Y. S. 1056, affirmed without opinion (1904) 178 N. Y. S. 580, 70 N. E. 1107.

Passive trust.—Where no active duty is imposed upon trustees, the trust is passive and vests no title in them, but the estate passes directly to the devisees by virtue of this section and section 93. *Matter of Cooney*, (1906) 112 App. Div. 659, 98 N. Y. S. 676.

Executor's authority.—An executor as such has no power of sale of real estate, nor any power to interfere with the real estate unless it is given to him by the will of the testator, and when he takes under such a will of course he must exercise that power according to the directions of the will. *Correll v. Lauterbach*, (1896) 12 App. Div. 531, 42 N. Y. S. 143, affirmed (1899) 159 N. Y. S. 553, mem.

When executors take a fee.—Where the absolute power of disposition is given to executors, and no other person has any interest in its execution and it is construed as unaccompanied by any trust, it is a beneficial power in them and they take an absolute fee. *Kinnier v. Rogers*, (1870) 42 N. Y. S. 531.

Right to partition.—The existence of a naked power of sale in executors for the purpose of division of the proceeds is not a bar to an action by the devisees for partition. *Mellen v. Banning*, (1893) 72 Hun 176, 25 N. Y. S. 542. See also *Duffy v. Duffy*, (1888) 50 Hun 266, 3 N. Y. S. 23, affirmed without opinion (1891) 130 N. Y. S. 654, 29 N. E. 1033; *Purdy v. Wright*, (1887) 44 Hun 239, 8 N. Y. St. Rep. 243. Thus, while a trust to appraise, divide and convey shares of real property is not authorized by statute, it is a proper subject of a power, and is not void because the testator has attempted to put it in the form of a trust, but it can be executed as power. *Manice v. Manice*, (1871) 43 N. Y. S. 303, reversing 1 Lans. 348. See also *Matter of Spears*, (1895) 89 Hun 49, 35 N. Y. S. 35; *Palmer v. Marshall*, (1894) 81 Hun 15, 30 N. Y. S. 567.

"Devisees of the testator."—The provision of the statute as to devisees undoubtedly has reference to devisees of land as land, followed by a naked power in trust to the executors to sell. In such a case the devisees could defeat the power of sale by a prior conveyance of their interest. *Lydon v. Metropolitan El. R. Co.*, (1894) 7 Misc. 25, 27 N. Y. S. 311.

Cited.—This section was cited in *Matter of Fagan*, (1914) 86 Misc. 144, 149 N. Y. S. 217.

§ 98. Surplus income of trust property liable to creditors. Where a trust is created to receive the rents and profits of real

property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which can not be reached by execution.

This section was derived from Real Property Law of 1896, § 78. The report of the Board of Statutory Consolidation (1907), page 4899, has the following note relating to this section: "The Code of Civil Procedure (section 1391), as conceded, has put an end to a large 'spendthrift trust' in this state. See *King v. Irving*, 103 App. Div. 420; *Sloane v. Tiffany*, 103 App. Div. 540. The effect of section 1391 of the Code is to permit certain creditors of beneficiaries of trusts created under the third subdivision of § 76 of the old Real Property Law, to have execution on their judgments. So important a reform in our domestic law of trusts deserves to be called to the attention of lawyers and laymen reading the Statute on Uses and Trusts and such a clause might be added to this section. It ought not to be left obscurely contained in a long section of the Code of Civil Procedure."

Effect of insolvent assignment upon trust power: see *infra*, § 164.

Judgment creditor's action: see Code Civ. Pro., § 1871 et seq.

Execution against trust income: see Code Civ. Pro., § 1391.

Option of cestui que trust to require conveyance or otherwise to terminate trust as subjecting property to claims of creditors: see 25 L. R. A. (N. S.) 236 note.

Constitutionality.—The authority of the legislature to reach wages or income, and to reach income from trust funds, for the benefit of a judgment creditor, even though the trust was created prior to the enactment of the statute, has been fully sustained. *Brearley School v. Ward*, (1911) 201 N. Y. 358, 94 N. E. 1001, 1912B 251, 40 L. R. A. (N. S.) 1215, affirming 138 App. Div. 833, 123 N. Y. S. 614; *Ellis v. Chapman*, (1914) 165 App. Div. 79, 150 N. Y. S. 673.

Purpose and scope.—The object of the legislature in authorizing an execution against income of a trust, would seem to be, and it has been held to be, to extend the law in favor of judgment creditors so as to reach a percentage of the income which might be necessary for the support and maintenance of the beneficiary. *Brearley School v. Ward*, (1911) 201 N. Y. 358, 94 N. E. 1001, 1912B 251, 40 L. R. A. (N. S.) 1215, affirming 138 App. Div. 833, 123 N. Y. S. 614; *Gillis v. Chapman*, (1914) 165 App. Div. 79, 150 N. Y. S. 673. And an action may be maintained by a judgment creditor after the return of an execution unsatisfied to reach the surplus income beyond what is necessary for the suitable support and maintenance of the cestui que trust and those dependent upon him. *Wetmore v. Wetmore*, (1896) 149 N. Y. 520, 44 N. E. 169, 52 A. S. R. 752, 33 L. R. A. 708, modifying 79 Hun 268, 29 N. Y. S. 440; *Tolles v. Wood*, (1885) 99 N. Y. 616, 1 N. E. 251; *Clute v. Bool*, (1840) 8 Paige 83; *Cruger v. Jones*, (1854) 18 Barb. 467.

Application to trusts of personality.—The rule laid down by this section has been extended by judicial construction to trusts of personal as well as trusts of real estate. *Brearley School v. Ward*, (1911) 201 N. Y. 358, 94 N. E. 1001, 1912B 251, 40 L. R. A. (N. S.) 1215, affirming 138 App. Div. 833, 123 N. Y. S. 614; *Wetmore v. Wetmore*, (1896) 149 N. Y. 520, 44 N. E. 169, 52 A. S. R. 752, 33 L. R. A. 708, modifying 79 Hun 268, 29 N. Y. S. 440; *Mills v. Husson*, (1893) 140 N. Y. 99, 35 N. E. 422; *Tolles v. Wood*, (1885) 99 N. Y. 616, 1 N. E. 251; *Williams v. Thorn*, (1877) 70 N. Y. 270; *Jenks v. Title Guarantee, etc., Co.*, (1915) 170 App. Div. 830, 156 N. Y. S. 478; *Demuth v. Kemp*, (1913) 159 App. Div. 422, 144 N. Y. S. 690, affirmed (1916) 216 N. Y. 757 mem.; *Butler v. Baudouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121; *Keeney v. Morse*, (1902) 71 App. Div. 104, 75 N. Y. S. 728; *Schenck v. Barnes*, (1898) 25 App. Div. 153, 49 N. Y. S. 222, affirmed (1898) 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; *Matter of Foster*, (1902) 38 Misc. 347, 77 N. Y. S. 922; *Hallett v. Thompson*, (1836) 5 Paige 583.

Anticipation of income.—The disposition of an income cannot be anticipated by the cestui que trust or encumbered by any contract entered into by him

providing for its pledge, transfer or alienation previous to its accumulation. *Tolles v. Wood*, (1885) 99 N. Y. 616, 1 N. E. 251.

Anticipation of income to payment of alimony.—A judgment in an action for divorce, awarding alimony to the wife, directed to be paid by the husband is within the intention of the section, and, after having exhausted the remedy given her by the Code to obtain payment of alimony, she is entitled through an action in equity to subject the surplus income, over what is required for the husband's support, of a testamentary trust created for the husband's benefit without any valid direction for the accumulation of income, to payment of her alimony both past due and to accrue. *Wetmore v. Wetmore*, (1896) 149 N. Y. 520, 44 N. E. 169, 52 A. S. R. 752, 33 L. R. A. 708, modifying 79 Hun 268, 29 N. Y. S. 440. See also *Andrews v. Whitney*, (1894) 82 Hun 117, 31 N. Y. S. 164.

"Claims of his creditors."—Only one who stands in the relation of a creditor of the *cestui que trust* is entitled to maintain an action under this section. *Noyes v. Blakeman*, (1852) 6 N. Y. 567, affirming 3 Sandf. 531. And then only when he has exhausted his remedy at law. *Butler v. Baudouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121. See also *Heppenstall v. Baudouine*, (1911) 73 Misc. 118, 132 N. Y. S. 511.

Power to reach annuity or legacy.—An annuity or legacy may be reached by creditors in equity, and a statement that it is for support does not render it exempt. *Gifford v. Rising*, (1889) 51 Hun 1, 3 N. Y. S. 392. See also *Degraw v. Clason*, (1844) 11 Paige 136.

Action by trustee in bankruptcy.—It has been held that the surplus income of a trust fund cannot be reached by a trustee in bankruptcy, but only by a creditor's action. *Butler v. Baudouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121; *McNabee v. Marks*, (1906) 51 Misc. 207, 99 N. Y. S. 960. But, on the other hand, it was held, in *Brown v. Barker*, (1902) 68 App. Div. 592, 74 N. Y. S. 43, that the surplus income passed to the trustee in bankruptcy of a *cestui que trust*. See also *In re Buchanan*, (1914) 219 Fed. 492, 134 C. C. A. 204.

Ultimate disposition of income.—Under a trust where the income, or so much thereof as may be necessary, is to be applied to the beneficiary's support, all the income beyond what is necessary for the support of the beneficiary goes to those who are to take it under the will if validly disposed of, and if not so disposed of then to those entitled to the next eventual estate. *Sherman v. Skuse*, (1901) 166 N. Y. 345, 59 N. E. 990, affirming 45 App. Div. 335, 60 N. Y. S. 1030.

Application of Code sections.—It was questioned at one time whether or not the Code provisions relating to the issue and return of an execution against the property of the judgment debtor, as a prerequisite of a creditor's action, applied to an action brought to reach surplus income under this section, but it was finally determined that they do, and this is now accepted as the settled law. *Demuth v. Kemp*, (1913) 159 App. Div. 422, 144 N. Y. S. 690, affirmed (1916) 216 N. Y. 757 *mem.*. See also *King v. Irving*, (1905) 103 App. Div. 420, 92 N. Y. S. 1094; *Sloane v. Tiffany*, (1905) 103 App. Div. 540, 93 N. Y. S. 149; *Keeney v. Morse*, (1902) 71 App. Div. 104, 75 N. Y. S. 728; *Dittmar v. Gould*, (1901) 60 App. Div. 94, 69 N. Y. S. 708.

Burden of proof.—The burden of proof is upon a creditor, who brings suit under the section, to show that a surplus exists. *Graff v. Bonnett*, (1865) 31 N. Y. 9, 88 Am. Dec. 236, affirming 2 Robt. 54, 25 How. Pr. 470. But it has been held that it was not incumbent on the plaintiff to show that a surplus of income existed at the time the action was commenced, and that the court might determine the proper amount to be allowed for the support and maintenance of the beneficiary and those legally dependent on him, and decree that any income there might be over and above that amount should be subject to the payment of the judgment. *Howard v. Leonard*, (1896) 3 App. Div. 277, 38 N. Y. S. 363. See also *Ellis v. Chapman*, (1914) 165 App. Div. 79, 150 N. Y. S. 672; *Bunnell v. Gardner*, (1896) 4 App. Div. 321, 28 N. Y. S. 569.

Procedure.—A complaint which fails to allege that the trustees of the fund reside here, or that the trust fund is within this jurisdiction, or that the testator, the creator of the trust, was at the time of his death a resident of this state, is defective and demurrable. *Sherman v. Tucker*, (1901) 60 App. Div. 127, 69 N. Y. S. 850.

Cited.—This section was cited in *Matter of Knibbs*, (1904) 45 Misc. 83, 91 N. Y. S. 697.

§ 99. When an authorized trust is valid as a power. Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

This section was derived from Real Property Law of 1896, § 79.

Purposes for which express trusts may be created: see *supra*, § 96.

Definition of power: see *infra*, § 131.

General and special powers in trust: see *infra*, §§ 137, 138.

When valid power in trust arises.—A valid power arises by operation of law, where an express trust is attempted to be created for a purpose which is otherwise lawful but is not authorized by our statutes. In such a case the trust fails, but if it directs or authorizes the performance of any act which may be lawfully performed under a power, it is valid as a power in trust. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Holly v. Hirsch*, (1892) 135 N. Y. 590, 32 N. E. 709, reversing 63 Hun 241, 17 N. Y. S. 821. See also *Cooke v. Platt*, (1885) 98 N. Y. 35; *Heermans v. Burt*, (1879) 78 N. Y. 259; *Smith v. Bowen*, (1866) 35 N. Y. 83; *Selden v. Vermilya*, (1850) 3 N. Y. 525, reversing 2 Sandf. 568; *Cutler v. Winberry*, (1916) 160 N. Y. S. 712; *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570; *Smith v. Chase*, (1895) 90 Hun 99, 35 N. Y. S. 615; *Richardson v. Hunt*, (1891) 59 Hun 627 mem., 14 N. Y. S. 48, 38 N. Y. St. Rep. 274; *Wainwright v. Low*, (1890) 57 Hun 386, 10 N. Y. S. 888, affirmed (1892) 132 N. Y. 313, 30 N. E. 747. Thus, while trusts to convey lands to a beneficiary are not enumerated in the statute of uses and trusts, they are valid as powers in trust where the purpose of the power is lawful. *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492. But the rule laid down by the section is not susceptible of the construction that a trust invalid because in conflict with some cardinal rule of law can be upheld as a power. Every trust necessarily includes a power. There is always something to be done to the trust property and the trustee is empowered to do it, and if the trust is invalid because the power to dispose of the property is not one that the law recognizes, it cannot be upheld as a power in trust. The rules applicable to the execution of trusts in this respect are equally applicable to the execution of powers. *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382. See also *Bliven v. Seymour*, (1882) 88 N. Y. 469, modifying 24 Hun 603; *Garvey v. McDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457. So, where a trust creates an unlawful suspension of the power of alienation, it cannot be upheld as a power. *Garvey v. McDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457. See also *Post v. Hover*, (1865) 33 N. Y. 593, affirming 30 Barb. 312; *Tucker v. Tucker*, (1851) 5 N. Y. 408, affirming 5 Barb. 99; *Keyser v. Mead*, (1907) 53 Misc. 114, 103 N. Y. S. 1091. Neither will an intent to create an express trust be presumed in the absence of an express declaration to that effect when the whole purpose of the deed, without peril to the rights of any person, can be accomplished under a power conferred by the deed. *Heermans v. Robertson*, (1876) 64 N. Y. 332, affirming 3 Hun 464, 5 Thomp. & C. 596. And equity will not interfere to compel the execution of a power where the purpose has been accomplished without its exercise. *Prentice v. Janssen*, (1880) 79 N. Y. 478, affirming 14 Hun 548.

Scope of power in trust.—The purposes of a power in trust are unlimited, except that they must be lawful purposes. *Kondolf v. Britton*, (1914) 160 App. Div. 381, 145 N. Y. S. 791. See to the same effect *Reynolds v. Denslow*, (1894) 80 Hun 359, 30 N. Y. S. 77.

Distinction between power in trust and estate in trust.—A power in trust is to be understood in contradiction to an estate in trust. The former is a mere authority or right to limit a use, while the latter is an estate or interest in the subject. A trustee is always invested with the legal estate; but this is not necessary with respect to the donee of the power. In the case of a power in trust there is always a person other than the donee or grantee of the power, which person is called the appointee, answering to the *cestui que trust* in a simple trust. *Farmers' Loan, etc., Co. v. Carroll*, (1849) 5 Barb. 613.

Existence together of trust and power in trust.—A trust and a power in trust, in a proper case, may exist together, where they are not inconsistent. The same person may hold the estate in trust for one purpose, and at the same time be a grantee of a power in trust, to be executed or take effect at some future day, for another. *Belmont v. O'Brien*, (1855) 12 N. Y. 394.

Trust to sell and convey.—A trust to sell or to convey lands, except for the benefit of creditors or legatees, or to satisfy some charge thereon, may be valid as a power in trust, but is not valid as a trust calling for or requiring any estate or interest in the trustee. *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348; *Crittenden v. Fairchild*, (1869) 41 N. Y. 289; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492; *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290; *Clark v. Crego*, (1867) 47 Barb. 599, affirmed without opinion (1873) 51 N. Y. 646. And a trust to sell land for distribution among devisees may be valid as a trust calling for an estate or interest in the trustee. *White v. Howard*, (1868) 52 Barb. 294, affirmed (1871) 46 N. Y. 144.

Discretionary power of sale.—A devise of property to executors "to use and dispose of the same as though I died intestate," and with power to sell and convey, has been held to be a discretionary power which does not create a trust estate in them, but is merely a power created for the purpose of division or distribution. *Parker v. Beer*, (1901) 65 App. Div. 598, 72 N. Y. S. 955, affirmed (1903) 173 N. Y. 332, 66 N. E. 3.

Power in trust to rent.—Where a power in trust was given to the executors to rent the lands until the youngest child became twenty-one, and then to sell and divide the proceeds among the heirs, it was held that immediately upon the death of the testator the son became vested with a present estate in fee, subject to the execution of the power in trust. *Sayles v. Best*, (1893) 140 N. Y. 368, 35 N. E. 636.

Dry or passive trust.—Where no duty is cast upon trustees, the trust is a dry or passive one, without force, and cannot be upheld as a power in trust. *Shuler v. Shuler*, (1910) 137 App. Div. 515, 121 N. Y. S. 869, reversing 63 Misc. 604, 118 N. Y. S. 629. See also *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 416.

"Shall remain in or descend to the persons otherwise entitled."—The provision of the section that the land "shall remain in or descend to the persons otherwise entitled" only applies to a case where the deed attempting to create a trust does not make a disposition of the rents and profits, or of the real property to which the trust relates. If it does make a disposition of that property, then, under section 92, the title vests in the person who is entitled to the rents and profits. *Lewis v. Howe*, (1901) 64 App. Div. 572, 72 N. Y. S. 851, affirmed (1903) 174 N. Y. 340, 66 N. E. 975, 1101. And the "persons otherwise entitled" must be those in whom the title would rest, independently of the deed. *New York Dry Dock Co. v. Stillman*, (1864) 30 N. Y. 174. So where the trust declared is not one recognized by the statute the title remains in the grantor, subject to the execution of the trust as a power. *Clapp v. Byrnes*, (1896) 3 App. Div. 284, 38 N. Y. S. 1063, affirmed (1898) 155 N. Y. 535, 50 N. E. 277; *Matter of Spears*, (1895) 89 Hun 49, 35 N. Y. S. 35. But it is a principle of law that where a trust is imposed, coupled with the power and discretion on the part of the devisee or legatee to control, use, and dispose of the whole estate in his discretion, the devise or bequest becomes absolute. *Solley v. Westcott*, (1904) 43 Misc. 188, 88 N. Y. S. 297.

Effect of power incapable of execution.—The existence of a power in trust, once valid in itself but incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case for the exercise of the equitable power of the court to remove a cloud upon the title. *Hotchkiss v. Elting*, (1861) 36 Barb. 38.

Application to personal property.—The statute applies equally to personal property. *Matter of Campbell*, (1914) 87 Misc. 83, 150 N. Y. S. 416.

Cited.—This section was cited in *Woerz v. Rademacher*, (1890) 120 N. Y. 62, 23 N. E. 1113; *Syracuse Sav. Bank v. Holden*, (1887) 105 N. Y. 415, 11 N. E. 950, affirming 36 Hun 168; *Weeks v. Cornwell*, (1887) 104 N. Y. 325, 10 N. E. 431; *Turco v. Trimboli*, (1912) 152 App. Div. 431, 137 N. Y. S. 343; *Robinson v. Adams*, (1903) 81 App. Div. 20, 80 N. Y. S. 1098, affirmed without opinion (1904) 179 N. Y. 558, 71 N. E. 1139; *Washburn v. Acome*, (1911) 74 Misc. 301, 131 N. Y. S. 963, affirmed without opinion 151 App. Div. 948, 136 N. Y. S. 1150.

§ 100. Trustee of express trust to have whole estate. Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.

This section was derived from Real Property Law of 1896, § 80. The report of the Board of Statutory Consolidation (1910), page 4900, has the following note relating to this section: "Section 100 of this chapter as it now stands misses the entire reform of the Revised Statutes. The intention of this section of the Revised Statutes was to abolish 'equitable estates,' which in the development of jurisprudence had come to resemble legal estates. Thus a beneficiary of a trust might have an equitable fee or an equitable estate tail. If an estate tail, it might be barred by equitable tenants in tail. All equitable estates were susceptible of the same limitations as legal estates. The revisers of the Revised Statutes, with a profound knowledge of the old law, intended to abolish this anomaly of 'equitable estates' of trust beneficiaries. The revisers of the Real Property Law, with great infelicity, missed the entire point of this reform. As it now stands § 100 is incorrect, for the beneficiary of a trust never does take a *legal* estate or interest, and its possible effect is to restore the old law relating to equitable estates, if it is construed strictly. The language of the Revised Statutes should, therefore, be restored."

Trustee of passive trust not to take: see *supra*, § 93.

Purposes for which express trusts may be created: see *supra*, § 96.

What trust interest may be alienated: see *infra*, § 103.

Reservation of a power: see *infra*, § 144.

Trustee of express trust may sue in own name: see Code Civ. Pro., § 449.

When real property held in trust liable to execution: see Code Civ. Pro., § 1431.

Right to have title registered under Torrens Law: see L. R. A. 1916D 61 note.

Section as declaratory of Revised Statutes.—This section was no innovation upon existing statutes, but was simply a re-enactment of a provision of the Law of Uses and Trusts. (4 R. S. [8th ed.] 2438, § 60). *Oviatt v. Hopkins*, (1897) 20 App. Div. 168, 46 N. Y. S. 959. Nor does it add anything to the common law rule concerning the character of estates taken by trustees, but was introduced in the statute relative to trust estates as a plain and concise declaration of the law on the subject. *Radley v. Kuhn*, (1883) 28 Hun 573, modified on other grounds (1884) 97 N. Y. 26.

Application to personal property.—The doctrine laid down by this section has been held equally applicable to personal property under section 11 of the Personal Property Law. *Williams v. Thorn*, (1877) 70 N. Y. 270; *Gilman v. Reddington*, (1861) 24 N. Y. 9, modifying 1 Hilt. 492; *Matter of Van Kleeck*, (1916) 95 Misc. 40, 158 N. Y. S. 539, affirmed 177 App. Div. 917;

Brown v. Barker, (1902) 68 App. Div. 592, 74 N. Y. S. 43. And a trustee with power to invest money and to pay over the increase is entitled to receive the income from the investment, and thus takes the legal title, and would, even if the subject were real estate. **Matter of Wilkins**, (1905) 183 N. Y. 104, 75 N. E. 1105, reversing 100 App. Div. 509, 91 N. Y. S. 1118.

"Shall vest in the trustee the legal estate."—The provision of the section, that a valid express trust "shall vest in the trustee the legal estate," does not mean that the entire absolute fee shall be vested in the trustee but simply so much of the estate as is put in trust and as is necessary to feed the trust. The remainder of the estate may remain in the creator of the trust, or may be disposed of by him in some other way or to some other person. The trustee takes a legal estate commensurate with the equitable estate, the legal estate being essential to uphold the trust. It is the whole trust estate that is vested in the trustee. An estate may be so vested subject to remainders and other future estates, and subjected to the execution of a power of sale on the part of any person which may terminate the trust. But during the continuance of the trust the entire legal estate must be vested in the trustee. **Crooke v. Kings County**, (1884) 97 N. Y. 421. See also **Matter of Tienken**, (1892) 131 N. Y. 391, 30 N. E. 109, affirming 60 Hun 417, 15 N. Y. S. 470; **Stevenson v. Lesley**, (1877) 70 N. Y. 512, modifying 9 Hun 637; **Doseher v. Wyckoff**, (1909) 132 App. Div. 139, 116 N. Y. S. 389; **Matter of Van Kleeck**, (1916) 95 Misc. 40, 158 N. Y. S. 539, affirmed 177 App. Div. 917; **Craver v. Jermain**, (1896) 17 Misc. 244, 40 N. Y. S. 1056. And as was said in **Nicholl v. Walworth**, (1847) 4 Denio 385: "The rule at common law, as well as by the statute, is that the trustee takes that quantity of interest only which the purposes of the trust require, and the instrument creating it permits. The legal estate is in the trustee so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled." See also **In re L'Hommedieu**, (1905) 138 Fed. 606, modified and affirmed 146 Fed. 708, 77 C. C. A. 134; **Bennett v. Garlock**, (1880) 79 N. Y. 302, 35 Am. Rep. 517, reversing 10 Hun 328; **Moore v. Appleby**, (1885) 36 Hun 368, affirmed (1888) 108 N. Y. 237, 15 N. E. 377; **Chism v. Keith**, (1874) 1 Hun 589. Thus a general devise to executors in trust vests no estate in them, except for such of the declared purposes as require that the title be vested in them. **Matter of Tompkins**, (1898) 154 N. Y. 634, 49 N. E. 135, modifying 10 App. Div. 572, 42 N. Y. S. 412. See also **Kelsey v. McTigue**, (1916) 171 App. Div. 877, 157 N. Y. S. 730; **Wald v. Weilhamer**, (1913) 82 Misc. 455, 144 N. Y. S. 929. But the section vests the whole estate in the trustee, both in law and in equity, only so far as it is qualified by the next succeeding section. **Briggs v. Davis**, (1860) 21 N. Y. 574, affirming 20 Barb. 392.

Application to future legal estates.—The provision of the section declaring that every valid express trust shall vest the whole estate in the trustees, is by settled construction limited to the trust estate, and has no application to future legal estates in lands covered by the trust, to take effect in possession on the termination of the trust. **Losey v. Stanley**, (1895) 147 N. Y. 566, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950. But see **Knowlton v. Atkins**, (1892) 134 N. Y. 313, 31 N. E. 914, affirming 56 Hun 408, 10 N. Y. S. 77. Also see **Matter of Easterly**, (1911) 202 N. Y. 466, 96 N. E. 122, reversing **Matter of Laniore**, (1910) 140 App. Div. 650, 125 N. Y. S. 1005; **Haendle v. Stewart**, (1903) 84 App. Div. 274, 82 N. Y. S. 823. A temporary estate vested in trustees does not interfere with or prevent the vesting of remainders or future estates entirely outside of and separate from the trust estate. **Craver v. Jermain**, (1896) 17 Misc. 244, 40 N. Y. S. 1056. See also **Embury v. Sheldon**, (1877) 68 N. Y. 227.

Assignment for benefit of creditors.—A general assignment for the benefit of creditors makes the assignee the trustee of an express trust, and vests title in him, subject only to the execution of the trust. **Northam v. Dutchess County Mut. Ins. Co.**, (1901) 166 N. Y. 319, 59 N. E. 912, 82 A. S. R. 655, reversing 51 App. Div. 618, 64 N. Y. S. 1144; **Paddell v. Janes**, (1914) 84 Misc. 212, 145 N. Y. S. 868; **Flint v. Bell**, (1882) 27 Hun 155, affirmed without opinion (1886) 101 N. Y. 688. But under the provisions of section 101 the assignor can declare to whom the land to which the trust relates shall belong in the event of its termination, and subject to its execution he can grant or devise the property. **People v. Bacon**, (1885) 99 N. Y. 275, 2 N. E. 4. See also **Marvin v. Smith**, (1871) 46 N. Y. 571, affirming 56 Barb. 600.

Alienability.—The grantee of lands devised subject to the execution of a trust has a legal estate against all persons except the trustee, and such an estate is alienable, subject to the execution of the trust. *Matter of Tompkins*, (1898) 154 N. Y. 634, 49 N. E. 135, modifying 10 App. Div. 572, 42 N. Y. S. 412.

Deed to one "as trustee."—It has been held that a deed to a person "as trustee" created a valid express trust, in the absence of evidence to the contrary, and that the whole estate in law and equity vested in him. *People v. Stock Brokers' Bldg. Co.*, (1888) 49 Hun 349, 2 N. Y. S. 113, affirmed without opinion (1889) 112 N. Y. 670, 20 N. E. 414.

Trust to sell or distribute.—A trust to sell or to convey lands, except for the benefit of creditors or legatees, or to satisfy some charge thereon, may be valid as a power in trust, but is not valid as a trust requiring any estate or interest in the trustee; and this rule also holds where a trust is created to sell lands for distribution among devisees. *White v. Howard*, (1868) 52 Barb. 294, affirmed (1871) 46 N. Y. 144.

Rule as to vesting of estates.—While the general rule favors the vesting of estates it was adopted by courts as a guide to the probable intention of testators and is never applied when that intention as gathered from the entire will, is that the estate should not vest. *Lewisohn v. Henry*, (1904) 179 N. Y. 352, 72 N. E. 239, affirming 92 App. Div. 532, 87 N. Y. S. 325. And where a valid devise in trust is plainly given and can be carried into effect, although other parts of the will fail, courts should ascertain what the testator might have done if he had known that those other parts were invalid. *Green v. Chester*, (1891) 62 Hun 329, 17 N. Y. S. 238, affirmed without opinion (1892) 131 N. Y. 629, 30 N. E. 863.

Effect of conveyance.—Where a conveyance in trust, by will, gave the trustee the entire legal estate in the land, subject to the right of the grantor to enforce performance to the trust in equity, it was held that a deed thereafter given by the grantor passed nothing to the grantee but an equitable right to enforce the performance of the trust. *Duvall v. English Evangelical Lutheran Church*, (1873) 53 N. Y. 500, affirming 35 Super. Ct. 505. See also *Wald v. Weilhamer*, (1913) 82 Misc. 455, 144 N. Y. S. 929. And where an express trust to receive the rents and profits of real estate and to apply the same to the use of a beneficiary during his lifetime is created, such beneficiary has no interest or estate in the land as such by virtue of the trust, and cannot convey his beneficiary interest. *Shindler v. Robinson*, (1912) 150 App. Div. 875, 135 N. Y. S. 1056.

Enforcement of trust.—The right given by the section to "enforce the performance of the trust" is a chose in action. *Schenck v. Barnes*, (1898) 156 N. Y. 316, 50 N. E. 967, affirming 25 App. Div. 153, 49 N. Y. S. 222. See also *Van Cott v. Prentice*, (1887) 104 N. Y. 45, 10 N. E. 257, affirming 35 Hun 317; *Newton v. Hunt*, (1909) 134 App. Div. 325, 119 N. Y. S. 3, affirmed without opinion (1911) 201 N. Y. 599, 95 N. E. 1134; *Craig v. Hone*, (1835) 2 Edw. Ch. 553. But the persons for whose benefit the trust is created can enforce its performance only by an action brought in their own names against the trustee. *Griffin v. Ford*, (1857) 1 Bosw. 123. The trust estate is vested in the trustee, and the beneficiary of the trust can have no interest therein, but has simply the right to enforce the trust. *Crooke v. Kings County*, (1884) 97 N. Y. 421. See also *Thompson v. Hart*, (1901) 58 App. Div. 439, 69 N. Y. S. 223, affirmed without opinion (1901) 169 N. Y. 571, 61 N. E. 1135.

Cited.—This section was cited in *United States v. Leverich*, (1881) 9 Fed. 586; *Ring v. McCoun*, (1851) 10 N. Y. 268, affirming 3 Sandf. 524; *Noyes v. Blakeman*, (1852) 6 N. Y. 567, affirming 3 Sandf. 531; *Butler v. Baudouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121; *Raymond v. Harris*, (1903) 84 App. Div. 546, 82 N. Y. S. 689; *Robinson v. Adams*, (1903) 81 App. Div. 20, 80 N. Y. S. 1098, affirmed without opinion (1904) 179 N. Y. 558, 71 N. E. 1139; *Garvey v. Union Trust Co.*, (1898) 29 App. Div. 513, 52 N. Y. S. 260; *Matter of Kingsley*, (1914) 145 N. Y. S. 662; *Wright v. Clark*, (1913) 81 Misc. 527, 142 N. Y. S. 812; *Bascom v. Weed*, (1907) 53 Misc. 496, 105 N. Y. S. 459; *McNaboe v. Marks*, (1906) 51 Misc. 207, 99 N. Y. S. 960; *Snow v. Kennedy*, (1906) 51 Misc. 234, 100 N. Y. S. 885; *Richards v. Crocker*, (1892) 66 Hun 629 mem., 20 N. Y. S. 954, affirmed without opinion (1894) 143 N. Y. 631,

37 N. E. 827; *McArthur v. Gordon*, (1889) 51 Hun 511, 4 N. Y. S. 584, affirmed without opinion (1891) 126 N. Y. 597, 27 N. E. 1033; *Corse v. Leggett*, (1857) 25 Barb. 389.

§ 101. Qualification of last section. The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under them.

This section was derived from Real Property Law of 1896, § 81.

Suspension of power of alienation: see supra, § 42.

Trustee of passive trust not to take: see supra, § 93.

When estate of trustee ceases: see infra, § 109.

Construction with prior section.—The section declares that the effect of section 100 which vests the whole legal and equitable estate in the trustee, shall not prevent the creator of a trust from declaring to whom the lands to which the trust relates shall belong upon the termination of the trust. This provision, so obviously negative in its character, was, undoubtedly, intended to prevent a construction of the previous section by which the grantor might be deemed incapacitated from making a disposition of the lands affected by the trust upon its termination. "The section created no new power of disposition, but recognized the existence of a right, which had not been affected by the declaration of the quality of the estate which the trustee of a valid express trust would take." *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805.

Rule as to vesting of estates.—It is the well settled principle that the law favors the vesting of estates, and unless a contrary intention is unequivocally expressed it will not be imputed. *Stevenson v. Lesley*, (1877) 70 N. Y. 512, modifying on other grounds 9 Hun 637; *Embury v. Sheldon*, (1877) 68 N. Y. 227; *Manice v. Manice*, (1871) 43 N. Y. 303, reversing 1 Lans. 348.

Power of disposition as indication of ownership.—The power of disposition given by section 100 and this section, to the creator of the trust, is a marked indication of ownership. *Colie v. Jamison*, (1875) 4 Hun 284. And the life beneficiary of a trust to receive rents, issues and profits has power to dispose of his remainder therein, subject to the execution of the trust. *Greer v. Chester*, (1891) 62 Hun 329, 17 N. Y. S. 238, 42 N. Y. St. Rep. 289, affirmed without opinion (1892) 131 N. Y. 629, 30 N. E. 863.

Conveyance of leased premises.—Under a deed of conveyance of leased premises to the grantee in trust to sell the same for a purpose authorized by statute the fee of the property vests in the trustee, and the lessee under any lease or renewal of a lease which the grantor might make after he had executed the trust deed would take subject to be divested of his possession by a sale made by the trustee in the performance of the trust. *Wald v. Weilhauser*, (1913) 82 Misc. 455, 141 N. Y. S. 929.

Title to assignee. It has been held, under this section that the title of an assignee for the benefit of creditors is not an absolute one as owner, but a qualified one. *Paddell v. James*, (1914) 84 Misc. 212, 145 N. Y. S. 868.

Qualifications of section.—The rule is well settled that a trustee takes a legal estate commensurate with the equitable estate, but outside of that there may be remainders and future estates, or powers of sale adequate to terminate the trust. *Matter of Tienken*, (1892) 131 N. Y. 391, 30 N. E. 109, affirming 60 Hun 417, 15 N. Y. S. 479; *Crooke v. Kings County*, (1884) 97 N. Y. 421. And the effect of the qualification contained in the section is that the grantors of a trust may declare to whom the lands belong if the trust fails or expires, and he may grant or devise the lands subject to the execution of the trust. *Briggs v. Davis*, (1860) 21 N. Y. 574, affirming 20 Barb. 392. Where a trust was created for the trustees to hold property during a period not exceeding two specified lives in being and upon the determination of the two lives the

testator devised all the estate so vested in his executors and trustees to the beneficiaries under the trust, it was held that the beneficiaries took a legal estate in the lands, subject to the execution of the trust. *Butler v. Green*, (1892) 65 Hun 99, 19 N. Y. S. 890.

Necessity of beneficiary.—There can be no valid trust unless there is a certain donee or beneficiary whom the law will recognize; and if there is, the use will not be defeated, though no trustee is named, or the trustee named is in law incapable of taking. *Levy v. Levy*, (1865) 33 N. Y. 97, reversing 40 Barb. 585.

Gift over on defeasance of primary gift.—A primary gift or trust which failed ab initio and never took effect constitutes no hindrance to a gift over upon the defeasance of that gift. An ulterior devise or a gift over to take effect upon the defeasance of a former devise, will take effect whether the failure of the primary devise is by the happening of some event, as the death of the devisee in the lifetime of the testator, so that the failure is absolute at the death of the testator and the taking effect of the will, or by some event happening subsequently and after the first gift has taken effect subject to the condition by which it is limited and may be defeated. *McLean v. Freeman*, (1877) 70 N. Y. 81, affirming 9 Hun 246.

Application of section to personal property.—The section is made applicable to an estate in personal property by section 11 of the Personal Property Law. *Matter of Van Kleeck*, (1916) 95 Misc. 40, 158 N. Y. S. 539, affirmed 177 App. Div. 917.

Cited.—This section was cited in *In re L'Honmiedieu*, (1905) 138 Fed. 606, modified and affirmed 146 Fed. 708, 77 C. C. A. 134; *Knowlton v. Atkins*, (1892) 134 N. Y. 313, 31 N. E. 914, affirming 56 Hun 408, 10 N. Y. S. 77; *Lugar v. Lugar*, (1914) 160 App. Div. 807, 146 N. Y. S. 37; *Hoepfner v. Sevestre*, (1890) 56 Hun 640 mem., 10 N. Y. S. 51, 30 N. Y. St. Rep. 296; *Hunter v. Hunter*, (1860) 31 Barb. 334; *Corse v. Leggett*, (1857) 25 Barb. 389.

§ 102. Interest remaining in grantor of express trust. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs.

This section was derived from Real Property Law of 1896, § 82.

Power of appointment not to prevent vesting: see supra, § 41.

Remainders on estates for life of third person: see supra, § 44.

Disposition of rents and profits: see supra, § 60.

Undisposed profits: see supra, § 63.

Reversion of interest to assignor for benefit of creditors: see infra, § 110.

Reservation of a power: see infra, § 144.

Purpose of section.—The section was intended to provide for undisposed of legal estates or interests in land. *Embury v. Sheldon*, (1877) 68 N. Y. 227. And where the whole estate in land is embraced in the trust the section has no application. *Briggs v. Davis*, (1860) 21 N. Y. 574, affirming 20 Barb. 392.

Failure to dispose of remainder of trust fund by will.—Where a testator whose only heirs are his widow and daughter, creates a trust fund for the benefit of his wife, but makes no disposition of the remainder, he dies intestate as to such remainder and it passes to them as undisposed of property; and upon the death of the daughter without issue her interest passes to the widow. *Pomroy v. Hincks*, (1904) 180 N. Y. 73, 72 N. E. 628, affirming 74 App. Div. 298, 77 N. Y. S. 595. Where the effect of a deed and trust agreement was to create a valid power in trust, to convert the land conveyed into money and invest the proceeds for the benefit of a life beneficiary, it was held that the reversionary interest in land not conveyed by the trust instrument remained in the creator of the trust, and upon the death of the life beneficiary reverted to the former. *Nearpass v. Newman*, (1887) 106 N. Y. 47, 12 N. E. 557. And where a testator devised a house and lot to his wife for life, with power to dispose of the same by her will to their descendants in fee, with the power of selection as she might think proper, which devise, together with certain legacies were, by the will of the testator, to be in lieu of his wife's right of dower;

and the testator then devised the residue of his estate not before bequeathed and devised to his wife, to trustees, in trust for the purposes of the will; and the widow afterwards elected to take her dower, instead of the provisions made for her in the will, it was held, that the whole legal and equitable interest in the house and lot, subject to the widow's right of dower therein, descended to the heirs at law of the testator, and did not go to the trustees under the will. *James v. James*, (1833) 4 Paige 115.

Application of section to undisposed of rents and profits.—It has been held that the section does not apply to undisposed of rents and profits, as such a construction would be inconsistent with section 63 of the statute. *Embury v. Sheldon*, (1877) 68 N. Y. 227. Where the trusts in a will were, in substance, to apply the rents, issues and profits of the trust fund for the use and benefit of the testator's only daughter, and, in case she died without issue, to divide the residue among certain devisees, four of which were incapable of taking by devise, and the daughter survived the testator and died without issue, it was held that a contingent remainder in four-sixths of the real estate was undisposed of by the will, and upon the death of the testator passed to his heirs, and that the daughter, as sole heir, became seized of this remainder, and upon her death it went to her heirs. *White v. Howard*, (1871) 46 N. Y. 144, affirming 52 Barb. 294. And a trust to receive the rents and profits of land and apply them to the use of one during his life, or for a shorter period, would terminate with his life or sooner, and then the estate would revert to the grantor in the deed or his heirs. *Lounsbury v. Purdy*, (1859) 18 N. Y. 515, affirming 17 Barb. 376. But where a testator gave to his wife an annuity to be paid by the executors out of his share in the rents of certain stores, it was held that this was, in legal effect, a trust to receive the rents and profits of the lands, and apply them to the payment of the annuity during the life of the annuitant, coupled with a power to sell the property upon the condition stated in the will; and that the trustees took the legal title during the life of the wife for the purposes of the trust, and the land, upon the death of the testator, descended to his heirs, or passed to his devisees, if disposed of by the will, subject to the trust estate in the executors. *Vernon v. Vernon*, (1873) 53 N. Y. 351, modifying 7 Lans. 492.

Cited.—This section was cited in *In re L'Hommedieu*, (1905) 138 Fed. 606, modified and affirmed 146 Fed. 708, 77 C. C. A. 134; *Townshend v. Frommer*, (1891) 125 N. Y. 446, 26 N. E. 805; *Garvey v. Union Trust Co.*, (1898) 29 App. Div. 513, 52 N. Y. S. 260; *Paddell v. James*, (1914) 84 Misc. 212, 145 N. Y. S. 868; *Kittell v. Osborn*, (1874) 4 Thomp. & C. 45; *Marvin v. Smith*, (1870) 56 Barb. 600, affirmed (1871) 46 N. Y. 571.

§ 103. What trust interest may be alienated. 1. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred.

2. The provisions of this section as here amended shall not impair or affect any rights existing on March twenty-fifth, nineteen hundred and three.

This section was derived from Real Property Law of 1896, § 83, as amended by L. 1903, ch. 88, § 1, and with L. 1903, ch. 88, § 2, incorporated. The report of the Board of Statutory Consolidation (1907), page 4900, has the following note relating to this section: "Section 83 of the 'old' Real Property Law was intended by the late revisers as the equivalent of 1 R. S. 730, § 63. They so state. The old section 63 prohibited the alienation of a beneficiary's interest in any trust for the receipt of the rents and profits of land, thus including the third and fourth express trusts. But the present section confines it to the third trust purpose, thus allowing the transfer of accumulations in a way not permitted by the Revised Statutes. It is true

that the beneficiary of the fourth trust is necessarily an infant, but if the interest is assignable it could probably be reached and could be bequeathed by the infant after he reaches the age of eighteen. This result was probably overlooked. In any event the Revised Statutes should be restored, as it is more consonant with the scheme of the article on Uses and Trusts."

Purposes for which express trusts may be created: see *supra*, § 96.

When income of trust fund of personal property not alienable: see *PERSONAL PROPERTY LAW*, § 15.

Modification of common law rule.—The section effected a change in the common law rule, which permitted the alienation of their interests by *cestuis que trustent*. *Paterson First Nat. Bank v. National Broadway Bank*, (1898) 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139, modifying 22 App. Div. 24, 47 N. Y. S. 880. And trust estates are inalienable by force of statute, although there is nothing in the nature of such an estate which makes them inalienable *ipso facto*. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282. But the section has no application to a trust created prior to the Revised Statutes. *Dyett v. Central Trust Co.*, (1893) 140 N. Y. 54, 35 N. E. 341.

What trust renders the estate inalienable.—It is only a trust to accumulate rents and profits of land and apply them to the use of a person generally, or a trust to accumulate rents and profits generally for the benefit of one or more infants, which renders the estate inalienable. *Radley v. Kuhn*, (1884) 97 N. Y. 26, modifying and affirming 28 Hun 573. See also *Campbell v. Foster*, (1866) 35 N. Y. 361, affirming 16 How. Pr. 275; *Dale v. Guaranty Trust Co.*, (1915) 168 App. Div. 601, 153 N. Y. S. 1041; *Farmers' Loan, etc., Co. v. Kip*, (1907) 120 App. Div. 347, 104 N. Y. S. 1092, affirmed (1908) 192 N. Y. 266, 85 N. E. 59; *Thall v. Dreyfus*, (1903) 84 App. Div. 569, 82 N. Y. S. 691; *Mills v. Mills*, (1900) 50 App. Div. 221, 63 N. Y. S. 771; *Bull v. Odell*, (1897) 19 App. Div. 605, 46 N. Y. S. 306; *Cook v. Straiton*, (1903) 41 Misc. 206, 83 N. Y. S. 964, affirmed without opinion 96 App. Div. 625, 89 N. Y. S. 1102. And a valid trust in lands vests the whole legal and equitable title in the trustee and is inalienable. *Savage v. Burnham*, (1858) 17 N. Y. 561. See also *Oviatt v. Hopkins*, (1897) 20 App. Div. 168, 46 N. Y. S. 959. But the prohibition against alienation by a beneficiary of rents, issues and profits does not apply where the life beneficiary is the settlor of the trust. Hence, the settlor of such trust may assign his interest in the income, as by giving a mortgage thereon. *Newton v. Hunt*, (1909) 134 App. Div. 325, 119 N. Y. S. 3, affirmed without opinion (1911) 201 N. Y. 599, 95 N. E. 1134. See also *Raymond v. Harris*, (1903) 84 App. Div. 546, 82 N. Y. S. 689. And where a will gave the use, income and profits of land to executors in trust for the benefit of infants until their majority, and upon the termination thereof devised the land to such infants, it was held that they took a vested interest in the remainder independent of the trust, which the court could authorize to be mortgaged. *Craver v. Jermain*, (1896) 17 Misc. 244, 40 N. Y. S. 1056.

Gift subject to be defeated by death of beneficiary.—Where there is a gift to another without qualification, subject to a trust and subject to be defeated in case of the death of the beneficiary before the termination of the trust, the title to the trust fund, subject only to the contingencies provided by the terms of the gift, is vested in the beneficiary. Such a beneficial interest in the principal of a trust fund may be transferred. *West v. Burke*, (1916) 219 N. Y. 7, 113 N. E. 561, affirming 165 App. Div. 667, 151 N. Y. S. 329.

Alienability of annuitant's interest.—In *Cochran v. Schell*, (1894) 140 N. Y. 516, 35 N. E. 971, affirming 64 Hun 576, 19 N. Y. S. 424, where a trust to executors for the receipt of the rents and profits of lands and for the payment therefrom of annuities was sustained under the third subdivision of section 96, the interest of an annuitant was held to be inalienable, under the provision of this section. See also *Stringer v. Young*, (1908) 191 N. Y. 157, 83 N. E. 690, modifying 110 App. Div. 37, 96 N. Y. S. 1052; *Matter of Kirby*, (1906) 113 App. Div. 705, 100 N. Y. S. 155; *Matter of Hull*, (1904) 97 App. Div. 258, 89 N. Y. S. 939; *Rothschild v. Roux*, (1903) 78 App. Div. 282, 79 N. Y. S. 833; *Matter of Foster*, (1902) 37 Misc. 581, 75 N. Y. S. 1067; *Clute v. Rool*, (1840) 8 Paige 83. An annuity chargeable upon a residuary estate independent of a trust is one thing, a beneficial interest in

a trust is another; one is assignable, the other is not; one does not prevent the vesting of the fee in possession, the other does. *People's Trust Co. v. Flynn*, (1905) 106 App. Div. 78, 94 N. Y. S. 436.

Disposition of income previous to its accumulation.—Where a trust provides for the payment of the income of the trust fund to the beneficiary, a judgment creditor of such beneficiary may maintain an action in equity to reach and appropriate to the payment of his judgment the surplus income beyond what is necessary for the suitable support and maintenance of the cestui que trust and those dependent upon him. The disposition of such an income cannot be anticipated by the cestui que trust or encumbered by any contract entered into by him providing for its pledge, transfer or alienation previous to its accumulation. *Tolles v. Wood*, (1885) 99 N. Y. 616, 1 N. E. 251, 16 Abb. N. Cas. 1. See also *Williams v. Thorn*, (1877) 70 N. Y. 270. It has been held that where, upon the death of the life beneficiary under a will constituting a trust the income becomes payable by force of section 63, supra, and section 11 of the Personal Property Law to the persons entitled to the next eventual estate, such income is not inalienable. *Ransom v. Ransom*, (1910) 70 Misc. 30, 127 N. Y. S. 1027, reversed on other grounds 147 App. Div. 835.

When life tenant under testamentary trust may not release to remainderman.—Where the life beneficiary of a testamentary trust was not entitled to the whole or any definite part of the income of the trust, but only to such part thereof as might be necessary for his support, the surplus thereof to be paid to the guardian of his children during their minority and to such children personally after attaining their majority, the principal of the trust to go to such children and their issue, if any, upon the death of the life tenant, and one of the children, after becoming of full age, conveyed his interest in the estate to his father, who thereupon released to himself his income in the share of the estate so conveyed to him, and then conveyed such share back to said son, it was held that such release and conveyance did not terminate the trust, since, under the statutes in question, the life beneficiary of a trust fund could not release his interest in the income thereof unless his title to the remainder was absolute and indefeasible and not subject to be divested or to diminution on the occurrence of subsequent contingencies. *Matter of United States Trust Co.*, (1903) 175 N. Y. 304, 67 N. E. 614, affirming 80 App. Div. 77, 80 N. Y. S. 475. See also *Phillips v. Pike*, (1907) 121 App. Div. 753, 106 N. Y. S. 486.

Trust created by debtor.—The provisions of the section do not affect a trust created by a debtor, under which he is the beneficiary, as against creditors, even though he was solvent when he created the trust and the creditors' claim arose thereafter. The policy of the statute is clear when applied to trusts created by third parties, but is without force when the debtor creates the trust. *Schenck v. Barnes*, (1898) 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395, affirming 25 App. Div. 153, 49 N. Y. S. 222.

Bankrupt's control over income of trust fund.—A bankrupt has no control over the income of a trust fund. The trust is preserved intact, except to the extent of the authority given to a court of equity to apply so much of the income as may not be required for the support and maintenance of the debtor to the payment of his debts to a certain class of creditors, which is a way of applying it to the use of a beneficiary. The right which the beneficiary has is a personal right to enforce the trust in equity, which is not an assignable right. *Butler v. Baudouine*, (1903) 84 App. Div. 215, 82 N. Y. S. 773, affirmed without opinion (1903) 177 N. Y. 530, 69 N. E. 1121. See also *McNaboe v. Marks*, (1906) 51 Misc. 207, 99 N. Y. S. 960.

Trust to lease lands for benefit of legatee.—A trust to lease lands for the benefit of a legatee is one of the kind of trusts authorized by the statute, and the trustees cannot alienate the lands during the trust term, nor can the cestui que trust dispose of his interest. *Garvey v. McDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457.

Application to personal property.—It has been held that the same rule should govern as to the inalienability of rents, profits and income, whether in trusts of real or of personal estates. *Stringer v. Young*, (1908) 191 N. Y. 157, 83 N. E. 690, modifying 110 App. Div. 37, 96 N. Y. S. 1052. See also *Lent v. Howard*, (1882) 89 N. Y. 169; *Campbell v. Foster*, (1866) 35 N. Y. 361, affirming 16 How. Pr. 275; *Graff v. Bonnett*, (1865) 31 N. Y. 9, 88 Am.

Dec. 236, affirming 2 Robt. 54, 25 How. Pr. 470; *Slater v. Slater*, (1906) 114 App. Div. 160, 99 N. Y. S. 564, affirmed without opinion (1907) 188 N. Y. 633, 81 N. E. 1176; *Brown v. Parker*, (1902) 68 App. Div. 592, 74 N. Y. S. 43; *Matter of Hogarty*, (1901) 62 App. Div. 79, 70 N. Y. S. 839; *Central Trust Co. v. Egleston*, (1905) 47 Misc. 475, 95 N. Y. S. 945, affirmed 110 App. Div. 893, reversed (1906) 185 N. Y. 23; *Matter of Foster*, (1902) 37 Misc. 581, 75 N. Y. S. 1067.

Construction with section 15 of Personal Property Law.—Section 15 of the Personal Property Law (formerly L. 1897, ch. 417, § 3) relating to alienability of the income of trust funds has been held not to be retroactive and to apply only to trusts created after its enactment; it superseded and took the place of chapter 452 of the Laws of 1893, changing the former rule (1 R. S. 730, § 63), which by its language was expressly applicable to “any trust heretofore or hereafter created,” thereby justifying the inference that the legislature intended to make the new statute prospective and applicable only to trusts created after its enactment. *Metcalfe v. Union Trust Co.*, (1905) 181 N. Y. 39, 73 N. E. 498, affirming 87 App. Div. 144, 84 N. Y. S. 183.

Effect of unlawful transfer.—Any person who receives property, knowing that it is the subject of a trust and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust, but also of the trustee, to reclaim possession. *Paterson First Nat. Bank v. National Broadway Bank*, (1898) 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139, modifying 22 App. Div. 24, 47 N. Y. S. 880. And every sale, conveyance, or other act of the trustee in contravention of the trust is absolutely void. *Cuthbert v. Chauvet*, (1893) 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745; *Douglas v. Cruger*, (1880) 80 N. Y. 15. But beneficiaries may alienate except so far as the statute prohibits. *Ransom v. Ransom*, (1910) 70 Misc. 30, 127 N. Y. S. 1027, reversed on other grounds 147 App. Div. 835.

Cited.—This section was cited in *Noyes v. Blakeman*, (1852) 6 N. Y. 567, affirming 3 Sandf. 531; *Tucker v. Tucker*, (1851) 5 N. Y. 408, affirming 5 Barb. 99; *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570; *Seely v. Fletcher*, (1909) 63 Misc. 448, 117 N. Y. S. 86; *Cruikshank v. Cruikshank*, (1902) 39 Misc. 401, 80 N. Y. S. 8; *Van Wyck v. Richman*, (1900) 33 Misc. 404, 68 N. Y. S. 473.

§ 104. Transferee of trust property protected. Where an express trust is created, but is not contained or declared in the conveyance to the trustee, the conveyance shall be deemed absolute as to the subsequent creditors of the trustee not having notice of the trust, and as to subsequent purchasers from the trustee, without notice and for a valuable consideration.

This section was derived from Real Property Law of 1896, § 84.

Grant to one where consideration paid by another: see supra, § 94.

Bona fide purchasers protected: see supra, § 95.

Notice to beneficiary and other persons where real property affected by trust is conveyed, mortgaged or leased: see infra, § 107.

Person paying money to trustee protected: see infra, § 108.

Proof of declaration of trust: see infra, § 242.

Rights of purchaser or incumbrancer for valuable consideration protected: see infra, § 266.

Conversion of property held by trustee: see PENAL LAW, §§ 1290, 1302.

Transfers of personal property in trust for transferrer: see PERSONAL PROPERTY LAW, § 34.

Transfers and charges of personal property with fraudulent intent: see PERSONAL PROPERTY LAW, § 35.

Notice of trust.—A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his authority, done by him with intent to defraud the estate, and which accomplishes that purpose, will bind the estate or the beneficiaries, as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority, such third person is not protected. See infra, § 105, note.

Use of word "trustee" following grantee's name.—The use of the word "trustee" after the name of the grantee in a conveyance is sufficient to put all subsequent purchasers from him upon inquiry as to the existence and nature of the trust. *Sternfels v. Watson*, (1905) 139 Fed. 505. To the same effect see *Union Pac. Co. v. Durant*, (1877) 95 U. S. 576, 24 U. S. (L. ed.) 391; *Geyser-Marion Gold-Min. Co. v. Stark*, (1901) 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684. But it has been held that the word "trustee" is merely *descriptio personae*, and that the conveyance is absolute, so that the grantee's power of conveyance is unlimited. *Greenwood Lake, etc., R. Co. v. New York, etc., R. Co.*, (1892) 134 N. Y. 435, 31 N. E. 874; *Title Guarantee, etc., Co. v. Fallon*, (1905) 101 App. Div. 187, 91 N. Y. S. 497; *Kanenbley v. Volkenberg*, (1902) 70 App. Div. 97, 75 N. Y. S. 8; *Towar v. Hale*, (1866) 46 Barb. 361. And a conveyance to one "as trustee" raises the presumption that he took title under an express trust, and he could, therefore, convey except in contravention of the trust. *People v. Stock Brokers' Bldg. Co.*, (1888) 49 Hun 349, 2 N. Y. S. 113, affirmed without opinion (1889) 112 N. Y. 670, 20 N. E. 414. See also *King v. Townshend*, (1894) 141 N. Y. 358, 36 N. E. 513, affirming 65 Hun 567, 20 N. Y. S. 602.

Cited.—This section was cited in *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58.

§ 105. When trustee may convey or exchange trust property.

1. If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property, or any part thereof, whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interests of such estate or that it is necessary or for the benefit of the estate to raise funds for the purpose of preserving it by paying off incumbrances or of improving it by erecting buildings or making other improvements, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interests of said estate, and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold if it shall appear to the court to be for the best interest of such estate.

2. Whenever, by the provisions of a will, or of a deed of trust, a power of sale is given to one or more executors or trustees, it shall be lawful for any such executor or trustee, subject to the approval of the supreme court, to acquire or exchange lands adjacent to the land or lands subject to such power of sale, as may be deemed desirable for the straightening or improvement of the boundary lines thereof, upon such terms and conditions as may be approved by the supreme court; and the supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such executor or trustee to acquire or exchange lands adjacent to the land or lands subject to such power of sale for the purposes mentioned.

The first subdivision of this section was derived from the Real Property Law of 1896, § 85, as amended by L. 1897, ch. 136, § 1. The second subdivision was derived from L. 1898, ch. 311, § 1.

Proceedings for disposition of real property of infant, lunatic, idiot, or habitual drunkard: see Code Civ. Pro., § 2345 et seq.

Power of trustee to mortgage trust property: see notes, 1 Ann. Cas. 942; 9 Ann. Cas. 643; 10 Ann. Cas. 255; Ann. Cas. 1916C 606 note; 7 L. R. A. (N. S.) 263.

Power of trustee to convey without consent of co-trustee: see 4 Ann. Cas. 953 note.

Personal liability of trustee on covenant in deed: see 43 L. R. A. (N. S. 6377) note.

Test as to right to convey.—The right of a trustee to convey depends upon whether the conveyance is in derogation of the trust. *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158; *Priessenger v. Sharp*, (1891) 59 Super. Ct. 315, 14 N. Y. S. 372, 39 N. Y. St. Rep. 260. And a trust estate is inalienable by express provision of law when the trust is expressed in the instrument which creates the estate. *Lang v. Everling*, (1893) 3 Misc. 530, 23 N. Y. S. 329. Thus where there were no persons in being by which an absolute estate in possession could be conveyed, the interest of the beneficiary being inalienable by statute, a conveyance by trustees of the estate was held to be void as contrary to the purposes of the trust. *Pruyn v. Sears*, (1916) 96 Misc. 200, 161 N. Y. S. 58.

"Except as provided in this section."—The words "except as provided in this section" qualify the statute so far as it relates to a sale of real property in contravention of the trust, but in no way extends the power of sale to an interest in the real property that is independent of the trust. *Matter of Easterly*, (1911) 202 N. Y. 466, 96 N. E. 122, reversing *Matter of Lamoree*, (1910) 140 App. Div. 650, 125 N. Y. S. 1005, reargument denied (1912) 204 N. Y. 586, 97 N. E. 399.

What is necessary to justify order of sale.—To justify an order of sale some necessity must be shown to exist for the use of the money in the preservation or improvement of the property which the estate is not in a condition to supply, and which can only be supplied by borrowing upon a mortgage on selling a part and using the proceeds. A sale may not be ordered for the purpose of reinvestment and with a view only to increase the income, even though the real estate be unproductive. *Matter of Roe*, (1890) 119 N. Y. 509, 23 N. E. 1063, affirming 53 Hun 433, 6 N. Y. S. 464. See also *Webster Realty Co. v. Delano*, (1909) 135 App. Div. 488, 120 N. Y. S. 440; *Matter of Mills*, (1898) 28 App. Div. 258, 50 N. Y. S. 995, affirming 22 Misc. 629, 50 N. Y. S. 966; *Matter of Morris*, (1892) 63 Hun 619, 18 N. Y. S. 680, affirmed without opinion (1892) 133 N. Y. 693, 31 N. E. 627; *Matter of Clarke*, (1891) 59 Hun 557, 14 N. Y. S. 43, affirmed without opinion (1891) 128 N. Y. 658, 29 N. E. 145. But a trustee has, as incident to his ownership of the fee and his power of management, the right to improve the trust property and estate. *Matter of Anderson*, (1914) 211 N. Y. 136, 105 N. E. 79, reversing 158 App. Div. 936, 143 N. Y. S. 627.

Power to mortgage.—Where a testator left but little personal estate, and resort to the real estate became necessary to carry out the purposes of the trust, it was held that the trustees had power, under and pursuant to orders of the court directing it, to borrow money for such purposes, and to mortgage the real estate to secure the same; that the court had power to make the orders and that, therefore, mortgages so executed were valid. *Rogers v. Rogers*, (1888) 111 N. Y. 228, 18 N. E. 636, affirming 18 Hun 409. And whether a particular mortgage upon the subject of a trust, executed by a trustee in accordance with an order of the Supreme Court, is in contravention, or in furtherance of the trust, is a question which must be decided by the court, and when the facts are conceded it is a question of law. *United States Trust Co. v. Roche*, (1889) 116 N. Y. 120, 22 N. E. 265, reversing 41 Hun 549, 4 N. Y. St. Rep. 39.

Effect of power of sale.—Within the limits of life, the duration of a trust may depend upon the will of the trustee or of the cestui que trust; and it may be terminated by the exercise of a power of sale by the one or the other. Such a power is not necessarily repugnant to the trust, nor is the conveyance under the power any violation of the statute which makes trust estates inalienable. A sale in such case, by the trustee, is not in contravention of the trust, and hence is not prohibited by the section. A sale by the cestui que trust is not a sale of his beneficial interest during the trust term and hence condemned by section 103. *Crooke v. Kings County*, (1884) 97 N. Y. 421.

But where a testator in creating a trust in real estate withholds from the trustee a power of sale and organizes the trust for a fixed period, it amounts to a direction that the land, not its proceeds, shall be held for the beneficiaries, and a sale by the trustees will be held to be in contravention of the trust, unless an emergency arises in which funds are required to save the estate from threatened loss, to improve it, where authority to improve is given, or to prevent serious and increasing injury. *Matter of Roe*, (1890) 119 N. Y. 509, 23 N. E. 1063, affirming 53 Hun 433, 6 N. Y. S. 464.

Where, in contemplation of marriage, lands were conveyed to trustees to receive the rents and profits and apply them to the separate use of the wife during her life, and the trust deed contained a power to the trustees to sell the lands and reinvest the proceeds, and hold them so reinvested to the same use, it was held that the power was valid and that a conveyance by the trustees passed a good title, and that such power was not repugnant to the trust created by the deed and that the conveyance by the trustees was not in violation of the statute prohibiting the alienation of trust estates. *Belmont v. O'Brien*, (1855) 12 N. Y. 394.

Power to sell as including power to exchange lands.—A will directing an executor to whom an undivided portion of lands held in common was conveyed in trust to sell them in his discretion for cash, or on credit, or for part cash and part credit as he should deem most to the advantage of the estate, was held to create a naked power in trust and the testator's interest in the lands passed upon his death to his heirs or devisees subject to the execution of the power. Under such power the executor could only make an actual sale for cash or credit, or part cash and part credit, and he had no authority to exchange the lands for other lands. *Turco v. Trimboli*, (1912) 152 App. Div. 431, 137 N. Y. S. 343.

Sale of contingent future estates.—Contingent future estates in land are vendible and alienable, and it is no objection to their sale that they may never vest in possession. There is no limitation contained in the statute upon the power of the court to direct a sale of such a trust interest, and the power is conferred when its exercise is necessary to the protection or for the best interests of the estate. *Matter of Asch*, (1902) 75 App. Div. 486, 78 N. Y. S. 561.

Infants' real property. The doctrine has been frequently declared in this state that a court of equity has no inherent power to direct the sale or mortgage of the real property of infants, and that its power in this respect is purely statutory. The question of the inherent power of a court of equity to order a sale of an infant's real property, upon the theory of a supposed benefit to him, is quite distinct from its acknowledged power in the enforcement and protection of trusts and from the power of courts in the exercise of their ordinary jurisdiction to establish or enforce rights of property between parties to a litigation, whether infants or adults. *Losey v. Stanley*, (1895) 147 N. Y. 560, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950. The provision declaring void every sale and conveyance in contravention of the trust expressed in the instrument by which the trust was created has reference to the unauthorized acts of trustees, and does not divest the court of its power over the legal estates of infant trustees. *Anderson v. Mather*, (1870) 44 N. Y. 249, affirming 38 Barb. 473.

Vested remainders. Where a trust created by will had no relation to the vested remainders, it was held that the court had no authority to authorize the trustees to mortgage the real estate so as to bind the interests of the remaindermen; but where the proceeds of the mortgage were used to erect new buildings which increased the value of the remainders, the court should make an allowance to persons who subjected their interests to the mortgage and thereby paid for the improvements. *Barker v. Barker*, (1916) 172 App. Div. 244, 158 N. Y. S. 413. The vested interests in remainder of infants which are not included in a trust estate for life cannot be included in a mortgage by the trustee under direction of the court by virtue of the provision of the section whereby a trustee under the direction of the court or judge may in a proper case be allowed to mortgage or sell the real estate held in trust. *Losey v. Stanley*, (1895) 147 N. Y. 560, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950.

Notice as to trustee's authority.—A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his

authority, done by him with intent to defraud the estate, and which accomplished that purpose, will bind the estate of the beneficiaries, as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority, such third person is not protected. *Kirsch v. Tozier*, (1894) 143 N. Y. 390, 38 N. E. 375, 42 A. S. R. 729, affirming 63 Hun 607, 18 N. Y. S. 334. See also *Fitzgerald v. Topping*, (1872) 48 N. Y. 438. Thus, where the grantees of land in trust for the payment of debts reconveyed to the grantor, reciting that the trusts had been executed, when in fact the debts had not all been paid, and the debtor then mortgaged the land to one having no actual notice of the trust, it was held that the reconveyance, being in contravention of the trust, was void, and that the legal estate remained in the trustees. *Briggs v. Davis*, (1859) 20 N. Y. 15, 75 Am. Dec. 363, modifying *Briggs v. Palmer*, (1855) 20 Barb. 392, judgment corrected on rearguments, (1860) 31 N. Y. 574. See also *Russell v. Russell*, (1867) 36 N. Y. 581, 93 Am. Dec. 540.

Purchasers for a valuable consideration with notice of a trust are deemed guilty of fraud, and upon that ground are held to be trustees for the persons beneficially interested. *Johnson v. Fleet*, (1835) 14 Wend. 176.

Transactions by trustee for his own benefit.—A trustee cannot purchase or deal in the trust property in his own behalf, or for his own benefit, directly or indirectly. This is a rule of equity and is not to be impaired or weakened. Such a purchase, however, is not void ab origine, but voidable only, and at the instance of the cestui que trust, or of a party who has acquired the rights which belong to one in that relation. Even while in the hands of the trustee the title may be confirmed as well by acquiescence and lapse of time as by the express act of the cestui que trust. And a legal estate acquired by a subsequent bona fide purchaser in good faith and without notice cannot be impeached even in equity, and he takes the land freed from the trust. *Harrington v. Erie County Sav. Bank*, (1886) 101 N. Y. 257, 4 N. E. 346. The section does not authorize a proceeding by the trustee holding an undivided interest for the benefit of himself and others to obtain permission to convey to himself individually and as an individual to convey to himself as trustee in order to exercise a power of sale so as to avoid a partition action. *Van Glahn v. Heins*, (1908) 128 App. Div. 167, 112 N. Y. S. 565.

Beneficiary as trustee.—A testamentary provision that upon the death of one of two trustees, the surviving trustee, who is also the sole beneficiary, shall continue to act as trustee for his own benefit, with power to sell and mortgage the real estate, does not invalidate the trust, and he can mortgage or sell only under the direction of the court. *Irving v. Irving*, (1897) 21 Misc. 743, 47 N. Y. S. 1052.

Application to personal property.—The provision of the section making every conveyance or other act of a trustee in contravention of the trust, absolutely void, applies to trusts of personal property. *Genet v. Hunt*, (1889) 113 N. Y. 158, 21 N. E. 91; *Matter of Merritt*, (1916) 94 Misc. 425, 159 N. Y. S. 558.

Cited.—This section was cited in *Goebel v. Illa*, (1888) 111 N. Y. 170, 18 N. E. 649, affirming 48 Hun 21, 15 N. Y. St. Rep. 256; *Matter of Gar-side*, (1914) 165 App. Div. 897, 149 N. Y. S. 647; *Lane v. Hustace*, (1913) 154 App. Div. 636, 139 N. Y. 784.

§ 106. When trustee may lease trust property. A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the

trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the supreme court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

This section was derived from Real Property Law of 1896, § 86.

Grant of special and beneficial power to life tenant to make leases: see *infra*, § 143.

Landlord and tenant generally: see *infra*, § 220 et seq.

Lease of real property of infant, lunatic, idiot or habitual drunkard contrary to provisions of will: see Code Civ. Pro., § 2357.

Limitation on leases of agricultural lands: See CONSTITUTION, art. I, § 13.

Term of lease by trustee: see 14 Ann. Cas. 651; Ann. Cas. 1914C 393 note.

Lease for term beyond termination of trust: see 13 L. R. A. (N. S.) 496 note.

Power of court to authorize lease for longer period than that contemplated by creator of trust: see 48 L. R. A. (N. S.) 1004 note.

Section as exclusive.—The only statutory power given to trustees to lease is that contained in the section. *Matter of New York*, (1903) 81 App. Div. 27, 81 N. Y. S. 32.

Leases for terms extending beyond trust period.—It has been held that trustees have no power, unless they are authorized by an order of the Supreme Court, to make a lease for a term of years which may exceed the trust period. *Tredwell v. Tredwell*, (1914) 86 Misc. 104, 148 N. Y. S. 391. See also *Corse v. Corse*, (1895) 144 N. Y. 569, 39 N. E. 630; *Pratt v. Clark*, (1907) 118 App. Div. 633, 103 N. Y. S. 612, appeal dismissed (1909) 196 N. Y. 502, 89 N. E. 1110. A trust created by the will of a testator who died in 1888, to receive rents and profits and to pay over or apply the same during a designated life for the benefit of certain persons named therein, was held to afford no authority to the trustees, given no express power to lease for any specified period, to execute in 1894 a lease of real property of the trust for the period of twenty-one years. *Matter of Armory Board*, (1899) 29 Misc. 174, 60 N. Y. S. 882. And where a trust requiring the trustees to rent property and pay over the issues and profits terminated with the death of the creator of the trust, it was held that the trustees had no power to thereafter renew leases, or in the leases executed by them to provide for the renewal of leases, after such death. *Gomez v. Gomez*, (1895) 147 N. Y. 195, 41 N. E. 420, affirming 81 Hun 566, 31 N. Y. S. 206; *Matter of McCaffrey*, (1888) 50 Hun 371, 3 N. Y. S. 96. See also *Steuber v. Huber*, (1905) 107 App. Div. 599, 95 N. Y. S. 348; *Weir v. Barker*, (1905) 104 App. Div. 112, 93 N. Y. S. 732; *Matter of New York*, (1903) 81 App. Div. 27, 81 N. Y. S. 32; *Matter of Hoysradt*, (1897) 20 Misc. 265, 45 N. Y. S. 841. But it has been held that a trustee holding a legal fee, determinable when the purposes of the trust shall cease, has power at law to lease for a term which may extend beyond the period of his trust estate, subject to the jurisdiction of a court of equity to annul the lease if unreasonable or improvident. *Greason v. Keteltas*, (1858) 17 N. Y. 491.

Lease of life tenant.—Where a person is only a life tenant of premises, he cannot give a lease for a longer period than the termination of his own estate. *Mulligan v. Cox*, (1899) 26 Misc. 709, 56 N. Y. S. 797.

Leases for five years.—The purpose of the statute being to enlarge rather than to restrict the powers of the trustee, words intended as a saving clause should not be given an unusual meaning in order to accomplish a purpose which we cannot say was in the mind of the legislature. If it had been the intention of the legislature to change the existing law of which they are presumed to have had knowledge, and to limit the power of the trustee, it

would have been very easy to have done so in plain and simple language free from ambiguity, and, although permissive language may be construed as being restrictive, such construction is not adopted unless necessary to effectuate the clear intention of the legislature. If the section in question had created a power in respect to leases for five years not theretofore existing, such power could be exercised only in the manner provided by the statute, but where the power to lease theretofore existed permissive language used in a statute should not be construed as restricting or limiting the power, where it is perfectly apparent that the purpose of the statute was to accomplish an entirely different end. *Weir v. Barker*, (1905) 104 App. Div. 112, 93 N. Y. S. 732.

Procedure.— It is not necessary to except to the findings of fact in order to raise the question as to the validity of a lease of trust property for a term of years affecting the rights of the remaindermen. *Barker v. Barker*, (1916) 172 App. Div. 244, 158 N. Y. S. 413.

§ 107. Notice to beneficiary and other persons interested where real property affected by a trust is conveyed, mortgaged or leased, and procedure thereupon. The supreme court shall not grant an order under either of the last two preceding sections unless it appears to the satisfaction of such court that a written notice stating the time and place of the application therefor has been served upon the beneficiary of such trust, and every other person in being having an estate vested or contingent in reversion or remainder in said real property at least eight days before the making thereof, if such beneficiary or other person is an adult within the state, or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such beneficiary or other person of such notice as the court or a justice thereof prescribes. The court shall appoint a guardian ad litem for any minor and for any lunatic, person of unsound mind or habitual drunkard who shall not be represented by a committee duly appointed. The application must be by petition duly verified which shall set forth the condition of the trust estate and the particular facts which make it necessary or proper that the application should be granted. After taking proof of the facts, either before the court or a referee, and hearing the parties and fully examining into the matter, the court must make a final order upon the application. In case the application is granted, the final order must authorize the real property affected by the trust or some portion thereof, to be mortgaged, sold or leased, upon such terms and conditions as the court may prescribe. In case a mortgage or sale of any portion of such real property is authorized, the final order must direct the disposition of the proceeds of such mortgage or sale and must require the trustee to give bond in such amount and with such sureties as the court directs, conditioned for the faithful discharge of his trust and for the due accounting for all moneys received by him pursuant to said order. If the trustee elects not to give such bond, the final order must require the proceeds of such mortgage or sale to be paid into court to be disposed of or invested as the court shall specially direct. Before a mort-

gage, sale or lease can be made pursuant to the final order, the trustee must enter into an agreement therefor, subject to the approval of the court and must report the agreement to the court under oath. Upon the confirmation thereof, by order of the court he must execute as directed by the court a mortgage, deed or lease. A mortgage, conveyance or lease made pursuant to a final order granted as provided in this and the last two preceding sections shall be valid and effectual against all minors, lunatics, persons of unsound mind, habitual drunkards and persons not in being interested in the trust or having estates vested or contingent in reversion or remainder in said real property, and against all other persons so interested or having such estates who shall consent to such order, or who have been made parties to such proceeding as herein provided.

This section was derived from Real Property Law of 1896, § 87. The report of the Board of Statutory Consolidation has a note relating to this section, and sections 67, 70 and 116, which is given in full in the note to section 67, *supra*.

Bona fide purchasers protected: see *supra*, § 95.

Transferee of trust property protected: see *supra*, § 104.

Proceedings for disposition of real property of infant, lunatic, idiot, or habitual drunkard: see Code Civ. Pro., § 2345 et seq.

Relation of section to preceding sections.—The section must be read in connection with sections 105 and 106. *Van Wyck v. Richman*, (1900) 33 Misc. 404, 68 N. Y. S. 473.

Notice to remaindermen.—It is the clear intention of the statute that all parties who might be ultimately interested in the estate by reason of the provisions of the trust should have notice of the proceedings. Service of the notice on a life tenant of a trust estate and not on the remaindermen was held insufficient. *Duffy v. Durant Land Imp. Co.*, (1894) 78 Hun 314, 29 N. Y. S. 165.

It was formerly held that the trust estate only could be mortgaged and that an estate in remainder was not affected by any mortgage authorized by the section. *Losey v. Stanley*, (1895) 147 N. Y. 560, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950. See also *New York Security, etc., Co. v. Schoenberg*, (1903) 87 App. Div. 262, 84 N. Y. S. 359, affirmed without opinion (1904) 177 N. Y. 556, 69 N. E. 1128.

Notice of appointment of substituted trustee.—Where both trustees of express trusts in real and personal estate have died without disposing of the real estate, and it is thereafter duly decided that the trust has devolved upon the Supreme Court, neither the heirs-at-law nor next of kin of deceased beneficiaries, taking as legatees, who have alienated their interests in the trust in their lifetime, are entitled to notice of an application for the appointment of a substituted trustee. *Van Wyck v. Richman*, (1900) 33 Misc. 404, 68 N. Y. S. 473.

Effect of final order.—If the proceeding is properly initiated and the order of sale is authorized, then, by force of the section, such order becomes effective in cutting off the interests of the persons therein enumerated. *Matter of Mills*, (1898) 28 App. Div. 258, 50 N. Y. S. 995.

Status of amendment of 1907.—The opinion in *Matter of Easterly*, (1911) 202 N. Y. 466, 96 N. E. 122, reversing *Matter of Lamoree*, (1910) 140 App. Div. 650, 125 N. Y. S. 1005, was not intended to construe or interpret the amendment made by chapter 242 of the Laws of 1907 to the section. *Matter of Easterly*, (1912) 204 N. Y. 586, 97 N. E. 399. See also *Barker v. Barker*, (1916) 172 App. Div. 244, 158 N. Y. S. 413.

§ 108. Person paying money to trustee protected. A person who shall actually and in good faith pay a sum of money to a

trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payments shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.

This section was derived from Real Property Law of 1896, § 88.

Bona fide purchasers protected: see supra, § 95.

Transference of trust property protected: see supra, § 104.

Conversion of property held by trustees: see PENAL LAW, §§ 1290, 1302.

Rule as departure from common law.—The rule laid down by the section was a departure from the common law rule. *McPherson v. Smith*, (1888) 49 Hun 254, 2 N. Y. S. 60.

Scope of section.—Under the section a person “who actually and in good faith pays money to a trustee, which the trustee, as such, is authorized to receive, is discharged from seeing to the application, or being answerable for the misapplication thereof.” *Moore v. American Loan, etc., Co.*, (1889) 115 N. Y. 65, 21 N. E. 681. To the same effect see *Thomas v. Evans*, (1887) 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519; *Belmont v. O'Brien*, (1855) 12 N. Y. 394; *Doscher v. Wyckoff*, (1909) 132 App. Div. 139, 116 N. Y. S. 389; *Voorhies v. Voorhies*, (1910) 66 Misc. 78, 120 N. Y. S. 677; *Wiltzie v. Shaw*, (1883) 29 Hun 195, affirmed (1885) 100 N. Y. 191, 3 N. E. 331; *Wilson v. Lynt*, (1857) 30 Barb. 124; *Calkins v. Long*, (1855) 22 Barb. 97; *Champlin v. Haight*, (1843) 10 Paige 274, reversed on other grounds 7 Hill 245. Thus where the principal of a mortgage is paid to a person authorized to receive it, the mortgagor is not bound to see to the application made of the sum paid. *Forbes v. Reynard*, (1906) 49 Misc. 154, 98 N. Y. S. 708, affirmed 113 App. Div. 306, 98 N. Y. S. 710. And a trustee who is intrusted with the management of an estate, without any restriction upon his authority, can invest and reinvest, sell and transfer, and purchasers in good faith will be protected, regardless of the dissipation of the funds by the trustee. *Washburn v. Benedict*, (1899) 46 App. Div. 484, 61 N. Y. S. 387.

Notice of trustee's authority.—A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his authority, done by him with intent to defraud the estate, and which accomplished that purpose, will bind the estate or the beneficiaries as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority such third person is not protected. *Kirsch v. Tozier*, (1894) 143 N. Y. 390, 38 N. E. 375, 42 A. S. R. 729, affirming 63 Hun 607, 18 N. Y. S. 334; *Briggs v. Davis*, (1859) 20 N. Y. 15, 75 Am. Dec. 363, modifying 20 Barb. 392, judgment corrected on reargument (1860) 21 N. Y. 574. See also *Spencer v. Weber*, (1900) 163 N. Y. 493, 57 N. E. 753, affirming 26 App. Div. 285, 49 N. Y. S. 687; *Warren v. Union Bank*, (1898) 157 N. Y. 259, 51 N. E. 1036, 68 A. S. R. 777, 43 L. R. A. 256, reversing 28 App. Div. 7, 51 N. Y. S. 27. While the general rule is settled that a purchaser is relieved from any concern as to the disposition by the executor or trustee of the purchase money of property purchased from the executor or trustee, this rule does not apply where the purchaser knew that the transaction was not within the usual course of administration, and had notice of the fact that the property of the estate and the rights of the beneficiaries of the testator were put in jeopardy by the negligent, if not fraudulent, co-operation of the purchaser or mortgagee. *Moore v. American Loan, etc., Co.*, (1889) 115 N. Y. 65, 21 N. E. 681; *Benedict v. Arnoux*, (1896) 7 App. Div. 1, 39 N. Y. S. 793, reversed on other grounds (1898) 154 N. Y. 715, 49 N. E. 326; *McPherson v. Smith*, (1888) 49 Hun 254, 2 N. Y. S. 60. And where a trustee has no authority to act as such a person dealing with him is not protected. *Waterman v. Webster*, (1888) 108 N. Y. 157, 15 N. E. 380, affirming 33 Hun 611.

Effect of fraud.—In cases of fraud and collusion the court will follow the assets or proceeds in the hands of a purchaser. *Field v. Schieffelin*, (1823) 7 Johns. Ch. 150, 11 Am. Dec. 441; *Griswold v. Perry*, (1872) 7 Lans. 98.

§ 109. When estate of trustee ceases. When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

This section was derived from Real Property Law of 1896, § 89.

Purposes for which express trusts may be created: see *supra*, § 96.

Trust estate not to descend: see *infra*, § 111.

When trust vests in Supreme Court: see PERSONAL PROPERTY LAW, § 20.

Revocation of trust in personal property upon consent of all persons interested: see PERSONAL PROPERTY LAW, § 23.

When trusts cease.—All trusts end when the purposes for which they were created have been performed. In re L'Hommiedieu, (1905) 138 Fed. 606, modified and affirmed 146 Fed. 708, 77 C. C. A. 134; Hopkins v. Kent, (1895) 145 N. Y. 363, 40 N. E. 4; Watkins v. Reynolds, (1890) 123 N. Y. 211, 25 N. E. 322, reversing 51 Hun 175, 5 N. Y. S. 172; McLean v. Freeman, (1877) 70 N. Y. 81; Manice v. Manice, (1871) 43 N. Y. 303, reversing 1 Lans. 348; Kahn v. Tierney, (1909) 135 App. Div. 897, 120 N. Y. S. 663, affirmed (1911) 201 N. Y. 516 mem.; Matter of Murray, (1908) 124 App. Div. 548, 108 N. Y. S. 1047; Burke v. O'Brien, (1906) 115 App. Div. 574, 100 N. Y. S. 1048; Sharnan v. Jackson, (1904) 98 App. Div. 187, 90 N. Y. S. 469; Garvey v. Union Trust Co., (1898) 29 App. Div. 513, 52 N. Y. S. 260; Matter of Overton, (1915) 89 Misc. 59, 152 N. Y. S. 545; Fogarty v. Stange, (1910) 72 Misc. 225, 129 N. Y. S. 610; Case v. Case, (1896) 16 Misc. 393, 39 N. Y. S. 530; Richards v. Crocker, (1892) 66 Hun 629 mem., 20 N. Y. S. 954, affirmed (1894) 143 N. Y. 631, 37 N. E. 827; Harvey v. Brisbin, (1888) 50 Hun 376, 3 N. Y. S. 676, affirmed (1894) 143 N. Y. 151, 38 N. E. 108. Thus a trust with directions to apply the income to the benefit of the testator's children "until the youngest of my said children shall have attained the age of 25 years" was held to have ended when the youngest child arrived at twenty-five years or at his death, if before that age. Burke v. O'Brien, (1906) 115 App. Div. 574, 100 N. Y. S. 1048. And when respective trusts cease by the death of the beneficiaries, then the estate of the trustees in each respective portion also ceases. Cassagne v. Marvin, (1888) 48 Hun 619 mem., 1 N. Y. S. 590.

Lack of beneficiary.—A trust terminates when there ceases to be a beneficiary capable of calling for the enforcement of the same. Levy v. Levy, (1865) 33 N. Y. 97, reversing 40 Barb. 585; Wilcox v. Gilchrist, (1895) 85 Hun 1, 32 N. Y. S. 608; Bliss v. Fosdick, (1894) 76 Hun 508, 27 N. Y. S. 1053; Prun v. Sears, (1916) 96 Misc. 200, 161 N. Y. S. 58.

Termination of powers in trust.—A power in trust ceases with the termination of the purpose for which it was given. Brumer v. Meigs, (1876) 64 N. Y. 506, affirming 6 Hun 203; Manier v. Phelps, (1884) 15 Abb. N. Cas. 123; Harvey v. Brisbin, (1888) 50 Hun 376, 3 N. Y. S. 676, affirmed (1894) 143 N. Y. 151, 38 N. E. 108.

Necessity of conveyance by trustee.—Where the purpose for which an express trust was created has ceased, and no active duties of a trust nature are required the legal estate of the trustee is at an end; and there is no necessity of a reconveyance as the estate ceases by operation of law. Clark v. Clark, (1895) 147 N. Y. 639, 42 N. E. 275, affirming 84 Hun 362, 32 N. Y. S. 325; Watkins v. Reynolds, (1890) 123 N. Y. 211, 25 N. E. 322, reversing 51 Hun 175, 5 N. Y. S. 172; Matter of Livingston, (1866) 34 N. Y. 555, 32 How. Pr. 20, 2 Abb. Pr. N. S. 1; Briggs v. Davis, (1859) 20 N. Y. 15, 75 Am. Dec. 363, modifying 20 Barb. 392, judgment corrected on reargument (1860) 21 N. Y. 574; Matter of Murray, (1908) 124 App. Div. 548, 108 N. Y. S. 1047; Cusack v. Tweedy, (1890) 56 Hun 617 mem., 11 N. Y. S. 16, affirmed (1891) 126 N. Y. 81, 26 N. E. 1033, 36 N. Y. St. Rep. 455.

§ 110. Termination of trusts for the benefit of creditors. Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a

different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereupon revert to the assignor, his heirs, devisee or assignee, as if the trust had not been created.

This section was derived from Real Property Law of 1896, § 90.

Section 110 of the Real Property Law of 1896 is now covered by section 130.

Interest remaining in grantor of express trust: see *supra*, § 102.

Termination of trust by agreement of parties interested: see *Ann. Cas.* 1915B 723 note.

Retroactive effect of section.—The section does not confine its operation to assignments made after its passage, but its language imports that it applies to trusts theretofore created. *Kip v. Ilirsh*, (1886) 103 N. Y. 565, 9 N. E. 317.

Right of assignor to fix termination of trust.—Under the section the assignor in the deed of assignment may fix a reasonable time within which the trust shall be carried out and terminated. *Paddell v. Janes*, (1914) 84 Misc. 212, 145 N. Y. S. 868.

Reversion or remainder in assignor.—The section expressly recognizes an estate of reversion or remainder in the assignor. *Paddell v. Janes*, (1914) 84 Misc. 212, 145 N. Y. S. 868. See also *People v. Bacon*, (1885) 99 N. Y. 275, 3 N. E. 4; *Briggs v. Davis*, (1859) 20 N. Y. 15, 75 Am. Dec. 363, modifying 20 Barb. 392, judgment corrected on reargument (1860) 21 N. Y. 574; *Meehan v. Dobson*, (1911) 131 N. Y. S. 37. When on a judicial sale by an assignee for the benefit of creditors, the purchaser without the knowledge of the trustee or assignor entered into an agreement with the assignee's attorney, who procured the order and conducted the sale as auctioneer, to share with him the profits realized, the sale is null and void and the owner may assert title as against the purchaser; and although the property so sold is a remainder limited on a life estate not then expired, which remainder passes under an assignment for the benefit of creditors of a partnership, of which the remainderman is a member, he may assert his title against the purchaser when the assignment entitles him to any surplus after the firm debts are paid. *Bush v. Halstead*, (1907) 121 App. Div. 538, 106 N. Y. S. 133.

Presumption as to discharge of trust.—Where a deed of trust was silent as to the duration of the trust and there was no evidence that the trustees ever entered upon the discharge of their duties or took possession of the trust property, it was held that as more than twenty-five years had elapsed since the creation of the trust it should be deemed discharged, and that the estate reverted to the grantor. *Green v. Heruz*, (1895) 14 Misc. 474, 35 N. Y. S. 843, affirmed 2 App. Div. 255, 37 N. Y. S. 887. And where over twenty-five years had elapsed since a partner, holding lands for his own benefit and that of his copartners, conveyed the lands to trustees for the payment of firm debts, and to be disposed of by them within one year, and it did not appear by the records or otherwise that the trustees ever conveyed the lands, it was held that the presumption was that they never executed the trust, and the lands reverted to the granting partner and, under him, to his copartners and their heirs. *Ne-Ha-Sa-Ne Park Ass'n v. Lloyd*, (1898) 25 Misc. 207, 55 N. Y. S. 108, affirmed 45 App. Div. 631, 61 N. Y. S. 1143, affirmed (1901) 167 N. Y. 431, 60 N. E. 741.

Burden of proof.—The burden of proof is upon the heirs or devisees of the assignor to show that at the alleged expiration of twenty-five years the property remained undisposed of by the trustee. *Meehan v. Dobson*, (1911) 131 N. Y. S. 37.

Application of section to personalty.—The section applies to personal as well as real estate. *Mills v. Husson*, (1893) 140 N. Y. 99, 35 N. E. 422; *Paddell v. Janes*, (1914) 84 Misc. 212, 145 N. Y. S. 868.

§ 111. Trust estate not to descend. On the death of the last surviving or sole surviving trustee of an express trust the trust estate shall not descend to his heirs nor pass to his next of kin or

personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the supreme court, with all the powers and duties of the original trustee or trustees, and shall be executed by some person appointed for that purpose under the direction of the court, but who shall not be appointed until the beneficiary or beneficiaries shall have been brought into court by such notice and in such manner as the court or a justice thereof may direct; and the person so appointed shall give such security as the court may require, and shall be subject to the same requirements of law as to accounting and the administration of the trust as are testamentary trustees; and shall be entitled to such compensation for his services by way of commissions as may be fixed by any court which has power to pass upon his final account, which shall in no case exceed that now allowed by law to executors and administrators, besides his just and reasonable expenses in the matter in which he is appointed.

This section was derived from Real Property Law of 1896, § 91, as amended by L. 1902, ch. 151, § 1. It was amended by L. 1911, ch. 216, § 1. This amendment affected the phrase following the semicolon near the end of the section and substituted the words "may be fixed by any court which has power to pass upon his final account" for the words "the court appointing him shall determine."

Section 111 of the Real Property Law of 1896 is now covered by section 131.

Application of section to trust powers: see *infra*, § 182.

When trust vests in Supreme Court: see PERSONAL PROPERTY LAW, § 20.

Proceedings in case of death of assignee for benefit of creditors: see DEBTOR AND CREDITOR LAW, § 11.

Power of surrogate to appoint successor to testamentary trustee: see Code Civ. Pro., § 2638.

Trustee's commissions generally: see Code Civ. Pro., § 3320.

Commissions of executor, administrator and testamentary trustee: see Code Civ. Pro., § 2753.

Power of successor to corporation designated as trustee to execute trust: see Ann. Cas. 1915D 934 note.

Source of section.—The section is in effect a re-enactment of the Revised Statutes (§ 68, vol. 1, p. 730), which provided that "upon the death of the surviving trustee of an express trust, the trust shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the Court of Chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court." *Matter of Runk*, (1911) 200 N. Y. 447, 94 N. E. 363, reversing 138 App. Div. 789, 123 N. Y. S. 523.

Scope of section.—The section relates only to trusts of real property but applies to all express trusts in such property. *Matter of Runk*, (1911) 200 N. Y. 447, 94 N. E. 363, reversing 138 App. Div. 789, 123 N. Y. S. 523; *McCaughal v. Ryan*, (1857) 27 Barb. 376; *Matter of Valentine*, (1884) 3 Dem. 563. It authorizes the appointment of a new trustee only where the surviving trustee dies, so that no person is left to execute the trust. *Matter of Van Schoonhoven*, (1836) 5 Paige 559. Prior to the enactment of practically the same provisions relating to personal property in 1882 (L. 1882, ch. 185) it was held that the section related to personal as well as real property. *Hawley v. Ross*, (1838) 7 Paige 103.

Rule prior to Revised Statutes.—In trusts created prior to the Revised Statutes, the legal title of the trustee descended to his heirs. *Wood v. Mather*, (1862) 38 Barb. 473, affirmed (1870) 44 N. Y. 249.

Death of testamentary trustee.—On the death of a testamentary trustee the trust vests in the Supreme Court, and under section 2638 of the Code of

Civil Procedure the surrogate has power to appoint a trustee to execute the unexecuted trust. *Matter of Silliman*, (1910) 67 Misc. 27, 124 N. Y. S. 622; *Matter of Hecht*, (1893) 71 Hun 62, 24 N. Y. S. 540.

Death of assignee or trustee for benefit of creditors.—In *Matter of Magnus*, (1893) 2 Misc. 347, 22 N. Y. S. 70, 50 N. Y. St. Rep. 599, affirmed (1893) 137 N. Y. 630, 33 N. E. 745, 51 N. Y. St. Rep. 932, the court said: "The personal representative of a deceased assignee must be brought in and substituted in such proceeding in place of the assignee, as having the custody of the property of the deceased trustee; and the only exception provided for under that act where such personal representative may not be appointed is where it appears that [the assignee dies] subsequent to the filing of the bond and before any proceeding has been had thereunder the surety may apply for the appointment of a new assignee. Hence, if proceedings have been taken it follows that the right of the surety to ask for the appointment of a new assignee is barred. This right of the personal representative to be substituted in the place of the deceased assignee has been determined by the courts of this state, upon the theory that the personal representative having the custody of the property of the deceased trustee is the only person who is able to account for the same." But this ruling was criticised in *Matter of Tousey*, (1896) 2 App. Div. 569, 37 N. Y. S. 1025, wherein the court held that under the provisions of chapter 185, Laws of 1882 (see Personal Property Law, § 20), the trust vested in the Supreme Court on the death of an assignee and not in his personal representatives, and that it was within the discretion of the court to appoint a proper person to continue the execution of the trust. In commenting on *Matter of Tousey*, (1896) 2 App. Div. 569, 37 N. Y. S. 1025, the court in *Rogers v. Pell*, (1901) 166 N. Y. 565, 60 N. E. 265, said: "That case upheld the appointment by the Supreme Court of a substituted assignee for the benefit of creditors, and the opinion very clearly demonstrates that if there were no provision of the statute whatever authorizing an appointment by the court of an assignee in the place of a general assignee, removed by death or otherwise, the lower to make such an appointment rests in the Supreme Court." In *Hayne v. Sealy*, (1898) 22 Misc. 243, 48 N. Y. S. 769, affirmed 35 App. Div. 633, 55 N. Y. S. 1141, (1901) 168 N. Y. 647 mem., 61 N. E. 1130, it was held that the administrator of a deceased assignee does not succeed to his title to the assigned estate, but only to his individual estate, as the statute provides for the appointment of a successor to a deceased assignee; that it permits the executor or administrator of a deceased assignee to be made a party to an accounting, but only because he is to account for the effects of the assigned estate which came into his hands from the possession of the decedent.

When trust vests in Supreme Court.—The Supreme Court has inherent power to execute a trust, and in the absence of a trustee it may take upon itself its execution. *Toncle v. Wetmore*, (1909) 195 N. Y. 436, 88 N. E. 1068, reversing 124 App. Div. 686, 109 N. Y. S. 349; *Kirk v. Kirk*, (1893) 137 N. Y. 510, 33 N. E. 552; *Wainwright v. Low*, (1892) 132 N. Y. 313, 30 N. E. 747, affirming 57 Hun 386, 10 N. Y. S. 888; *Greenland v. Waddell*, (1889) 116 N. Y. 234, 22 N. E. 367, 15 A. S. R. 400; *Rogers v. Rogers*, (1888) 111 N. Y. 228, 18 N. E. 636, affirming 18 Hun 409; *Whitehead v. Draper*, (1909) 132 App. Div. 799, 117 N. Y. S. 539; *Matter of Gental*, (1904) 97 App. Div. 530, 90 N. Y. S. 138; *Clark v. Crego*, (1867) 47 Barb. 599, affirmed (1873) 51 N. Y. 646; *Glen v. Gibson*, (1850) 9 Barb. 634. And the court will exercise this power when occasion properly arises requiring it. *Greenland v. Waddell*, (1889) 116 N. Y. 234, 22 N. E. 367, 15 A. S. R. 400; *Cooke v. Platt*, (1885) 98 N. Y. 35; *Farrar v. McCue*, (1882) 89 N. Y. 139; *Delaney v. McCormack*, (1882) 88 N. Y. 174; *Matter of Mayne*, (1904) 98 App. Div. 171, 90 N. Y. S. 1050; *Jewett v. Schmidt*, (1903) 83 App. Div. 276, 82 N. Y. S. 49. But a trust does not vest in the Supreme Court to be executed by a trustee, as such, which was fully executed as a trust during the lifetime of the deceased trustee. *Matter of Post*, (1900) 30 Misc. 551, 64 N. Y. S. 369.

Trustee as successor of the court.—A trustee, when appointed, becomes the successor of the court in the administration of the trust, and will be bound by its judgments and directions with respect to the trust estate to the same extent as if he had been a party to the action. *Kirk v. Kirk*, (1893) 137 N. Y. 510, 33 N. E. 552.

Power of court to determine validity of trust and rights of parties.—The court has jurisdiction only to inquire whether a deceased trustee was at the time of his death engaged in the execution of an apparent trust, and whether that trust remains in any respect unexecuted; if these facts appear it is the duty of the court to make the appointment. It may not determine questions involving the rights and interests of the various parties interested, as they are affected by the validity, extent and character of the trust, or the right of possession of the property alleged to be covered by it. *Matter of Waring*, (1885) 99 N. Y. 114, 1 N. E. 310; *Matter of Landmesser*, (1905) 101 App. Div. 110, 91 N. Y. S. 774; *Matter of Bierbaum*, (1886) 40 Hun 504, 1 N. Y. St. Rep. 470. In appointing a trustee the court will not stop to inquire whether there is a valid trust provision or not, as that question can be settled when it is sought to execute and enforce the trust provision. *Matter of Mayne*, (1904) 98 App. Div. 171, 90 N. Y. S. 1050; *Matter of Guental*, (1904) 97 App. Div. 530, 90 N. Y. S. 138. But it has been held that a new trustee will not be appointed in place of one deceased where it clearly appears that the trust or power is void. *Matter of Butterfield*, (1892) 133 N. Y. 473, 31 N. E. 515, 45 N. Y. St. Rep. 844, affirming *Matter of Christie*, (1891) 59 Hun 153, 13 N. Y. S. 262.

Power of Surrogate's Court to compel settlement of accounts.—A Surrogate's Court has power by statute to entertain a proceeding for the judicial settlement of the accounts of a trustee appointed by the Supreme Court, as the successor of a deceased testamentary trustee named in a will, and any trustee, whether appointed by a last will or testament, or by any other competent authority, is now authorized by express legislative enactment to render his accounts to that court. *Matter of Runk*, (1911) 200 N. Y. 447, 94 N. E. 363, reversing 138 App. Div. 789, 123 N. Y. S. 523.

When legal title of trustee does not pass to administrator with will annexed.—Where a testatrix devises lands to executors upon the trust to invest and reinvest and pay the income to a life beneficiary with remainders over, and gives to the executors a full power of sale and the court has held the same to work an equitable conversion so that the lands are to be treated as personal property, an administrator with the will annexed appointed after the death of the executor does not take his legal title, but merely the power of sale, and on the death of the executor the legal title vests in the Supreme Court, which has power to appoint a person to execute the trust. *Kelsey v. McTigue*, (1916) 171 App. Div. 877, 157 N. Y. S. 730; *Horsfield v. Black*, (1899) 40 App. Div. 264, 57 N. Y. S. 1066. See also *Dunning v. Ocean Nat. Bank*, (1875) 61 N. Y. 497, 19 Am. Rep. 293, affirming 6 Lat. S. 296.

Unexecuted power of sale.—There seems to be a conflict of opinion as to whether an unexecuted power of sale given to executors or trustees vests in the Supreme Court, or passes to an administrator with the will annexed. It has been held that upon the death of executors and trustees before executing a power of sale, the trust vests in the Supreme Court, and a sale by a trustee appointed by the court to execute the trust is valid. *Cooke v. Platt*, (1885) 98 N. Y. 35; *Roome v. Philips*, (1863) 27 N. Y. 357; *Leggett v. Hunter*, (1859) 19 N. Y. 445, affirming 25 Barb. 81; *Kortright v. Storminger*, (1888) 49 Hun 249, 1 N. Y. S. 880; *Forman v. Young*, (1915) 166 App. Div. 815, 152 N. Y. S. 417. But on the other hand it has been held that an unexecuted power of sale does not vest in the Supreme Court, but passes to the administrator with the will annexed. *Matter of Christie*, (1891) 59 Hun 153, 13 N. Y. S. 262, affirmed as *Matter of Butterfield*, (1892) 133 N. Y. 473, 31 N. E. 515, 45 N. Y. St. Rep. 844. See also *Correll v. Lauterbach*, (1896) 12 App. Div. 531, 41 N. Y. S. 143, affirmed without opinion (1899) 159 N. Y. 553, 54 N. E. 1089. And in *Mott v. Ackerman*, (1883) 92 N. Y. 539, it was held that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute passes to and may be exercised by the administrator with the will annexed.

Appointment of beneficiary as trustee.—In *Mulry v. Mulry*, (1895) 89 Hun 531, 35 N. Y. S. 618, the appointment of a beneficiary of the trust estate, as substituted trustee, was upheld as a valid designation. And the appoint-

ment of a life beneficiary as trustee of the trust fund has been upheld. *People v. Donohue*, (1893) 70 Hun 317, 24 N. Y. S. 437. See also *Moke v. Norrie*, (1878) 14 Hun 128. But on the other hand it has been held that the trustee and the beneficiary must be distinct personalities, or otherwise there could be no trust, and the merger of interests in the same person would effect a legal estate in him of the same duration as the beneficial interest designated. *Greene v. Greene*, (1891) 125 N. Y. 506, 26 N. E. 739, 21 A. S. R. 743, affirming 54 Hun 93, 7 N. Y. S. 284; *Woodward v. James*, (1889) 115 N. Y. 346, 22 N. E. 150, modifying on other grounds 44 Hun 95, 7 N. Y. St. Rep. 411. An appointment of the beneficiary as trustee, made by the court on the death or resignation of the testamentary trustee, does not extinguish the trust, whether the trust would be void or not in its inception if the sole beneficiary had been appointed trustee by the instrument creating the trust. *Losey v. Stanley*, (1895) 147 N. Y. 560, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950. In *Rankine v. Metzger*, (1902) 69 App. Div. 264, 74 N. Y. S. 649, affirmed without opinion (1903) 174 N. Y. 540, 66 N. E. 1115, the court said: "It is a general and well-settled provision of law that the office of trustee and beneficiary may not be united in the same person, as the two interests are incompatible. (*Rogers v. Rogers*, 111 N. Y. 228; *Woodward v. James*, 115 *id.* 346.) It has not yet been decisively determined, however, whether a trust provision, otherwise good, would be defeated by this conjunction of interest. The Supreme Court is vested with power to appoint a person to carry out a good trust provision, where a surviving trustee of an express trust has died, and much reason exists for holding that the court may exercise the power to prevent the failure of a good trust provision which may be incapable of execution by reason of the conjoined interests of the trustee. (*Losey v. Stanley*, 147 N. Y. 560.) But however this may be, it is clearly the law that where two or more trustees are appointed to execute a trust, and one or both is under the infirmity of being a beneficiary, neither the trust nor its execution fails, as each may act for the other where disqualification exists, and all can act with respect to that portion of the property in which they have no interest. (*Rogers v. Rogers*, *supra*.)"

Notice to remaindermen.—Notice of the application required by the section should be given to remaindermen. *Matter of Yanz*, (1913) 156 App. Div. 239, 141 N. Y. S. 262; *Matter of Wetmore*, (1906) 113 App. Div. 232, 98 N. Y. S. 952; *Matter of Welch*, (1897) 20 App. Div. 412, 46 N. Y. S. 689, affirmed without opinion (1898) 154 N. Y. 774, 49 N. E. 1105; *Matter of Reinisch*, (1897) 20 App. Div. 416, 46 N. Y. S. 802.

Notice to beneficiary as to real and personal property.—Under the section the estate vests in the Supreme Court the same as does the trust estate of personal property (PERSONAL PROPERTY LAW, § 20) and shall be executed by some person appointed for that purpose under the direction of the court. The statute then provides that no person shall be appointed to execute the trust until the beneficiary thereof shall have been brought into court by such notice as the court may direct, but the bringing of the beneficiary into court is not made a condition precedent to the power to appoint under the Personal Property Law, and consequently the court may appoint upon such notice as it may under the circumstances require. *Matter of Earnshaw*, (1909) 196 N. Y. 330, 89 N. E. 825, reversing 131 App. Div. 915, 115 N. Y. S. 1119.

Commissions.—The amount of commissions allowed to testamentary trustees is governed by the law in force at the time of the settlement of their accounts, and where a substituted trustee of a testamentary trust dies before the trust is fully executed his estate is not entitled to half commissions on the whole corpus of the trust fund received by him, but only to commissions at half of the statutory rate upon the cash received by him upon taking over the trust fund and half commissions upon the moneys which he received during his administration of the estate by the liquidation of securities constituting part of the fund received, and which he was bound to reinvest. *Whitehead v. Draper*, (1909) 132 App. Div. 799, 117 N. Y. S. 539.

Cited.—This section was cited in *Anderson v. Mather*, (1870) 44 N. Y. 249; *Phelps v. Masterton, etc.*, *Dressing Co.*, (1865) 3 Robt. 517.

§ 112. Resignation or removal of trustee and appointment of successor. The supreme court has power, subject to the regulations established for the purpose in the general rules of practice:

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.

2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.

3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.

This section was derived from Real Property Law of 1896, § 92.

Section 112 of the Real Property Law of 1896 is now covered by section 132.

Application of section to trust powers: see *infra*, § 182.

Execution of power on death of trustee: see *infra*, § 160.

Removal of testamentary trustee by surrogate: see Code Civ. Pro., § 2638.

Removal of executors or testamentary trustees: see Code Civ. Pro., § 2569.

Power of court to remove trustee who leaves jurisdiction: see 20 Ann. Cas. 816 note.

Right of trustee to retract renunciation of trust: see Ann. Cas. 1916D 1301.

Right of substitute trustee to execute powers conferred on original trustee: see 16 Ann. Cas. 325 note; Ann. Cas. 1913A 1283 note.

Effect of resignation or removal of executor on his powers and duties as trustee: see Ann. Cas. 1914C 609 note.

Scope of section.—The section applies only to trusts connected with real estate, and is confined to express trusts only. *Hughes v. Cuming*, (1900) 165 N. Y. 91, 58 N. E. 794, reversing 36 App. Div. 302, 55 N. Y. S. 256; *Wood v. Brown*, (1866) 34 N. Y. 337. But the section is extended by § 182, *infra*, to apply equally to trust powers and the grantees of such powers. *Leggett v. Hunter*, (1859) 19 N. Y. 445, affirming 25 Barb. 81.

Refusal of one of several trustees to act.—Where several persons are named as trustees, and one of them refuses to accept and execute the trust, the whole estate vests in the others, who act in the same manner as if he were dead or had not been named. *King v. Donnelly*, (1835) 5 Paige 46. And where the trustee thus refusing executes a formal renunciation of the trust, he cannot thereafter accept and execute the trust unless it is under a new appointment as trustee. *Matter of Van Schoonhoven*, (1836) 5 Paige 559.

Necessity of proof where trustee resigns.—It is not the proper practice to accept the resignation of a trustee without requiring him to make proof of the facts alleged in his petition. The statute permits a trustee to obtain his discharge either by petition or by action, but the same rules apply with regard to the proof of the allegations he makes, whether he has made his application by petition and they are set forth in it, or by an action and they are stated in a complaint. In either case the resignation, if accepted, must be upon such terms as are just, but the acceptance of the resignation of a trustee is not a matter of course, and unless he shows some good reason the court will not discharge him. *Matter of Cutting*, (1900) 49 App. Div. 388, 63 N. Y. S. 246.

Resignation of trustee and executor.—The acceptance of the resignation as trustee, of a person named as executor in a will does not have the effect to relieve him from the execution, so far as it remains unexecuted, of the trust which was devolved upon him by virtue of the office of executor; and

while his relation as trustee, as distinguished from that of executor, may be treated as terminated by force of the order of the court, that of executor remains. *Greenland v. Waddell*, (1889) 116 N. Y. 234, 22 N. E. 367, 15 A. S. R. 400. See also *In re Van Wyck*, (1846) 1 Barb. Ch. 565. And where by judicial decree the executor has been wholly discharged as such, and left acting and liable only as trustee, he will be entitled to his commissions as trustee, and it is only in those cases in which the executor cannot be discharged and be left acting as trustee, but both offices from the necessity of the case remain in existence, that the right to commissions as trustee must be denied. *Wilkey v. Robinson*, (1895) 85 Hun 362, 32 N. Y. S. 1018.

Costs of application on resignation of trustee.—If trustees desire to resign they themselves should bear the expenditures occasioned by the matter, and not force the estate to pay for their convenience. *Matter of Abbot*, (1903) 39 Misc. 760, 80 N. Y. S. 1117.

Necessary parties in action to remove trustee.—All persons interested in a trust under a will are necessary parties in an action to remove a trustee, and remaindermen are especially interested, as directly bearing upon the preservation of the principal of the fund. *Elias v. Schwyer*, (1897) 13 App. Div. 336, 43 N. Y. S. 55; *Bear v. American Rapid Tel. Co.*, (1885) 36 Hun 400.

Grounds for removal of trustee.—As a general rule it is not every mistake or neglect of duty which will induce the court to remove a trustee, but the acts or omissions must be such as to endanger the trust property, or to show a lack of honesty, reasonable fidelity to the trust, or proper capacity to administer the affairs of the estate. *Matter of McGillivray*, (1893) 138 N. Y. 303, 33 N. E. 1077; *Matter of O'Hara*, (1891) 62 Hun 531, 17 N. Y. S. 91. But the law requires a trustee to assume a position where his every act is above suspicion and the trust estate, and it alone, can receive not only his best services, but his unbiased and uninfluenced judgment. When he has acted otherwise, or when he has placed himself in such a position that his personal interest has or may come in conflict with his interest as trustee, then the court never hesitates to remove him. Under such circumstances the court does not stop to inquire whether the transactions complained of were fair or unfair. *Pyle v. Pyle*, (1910) 137 App. Div. 568, 122 N. Y. S. 256, affirmed without opinion (1910) 199 N. Y. 538, 92 N. E. 1099. Thus the removal of a trustee is proper where the relations between him and his cotrustee are such that they will probably not co-operate in carrying out the trusts beneficially to those interested, and a majority of the beneficiaries ask for such removal, and it is not material how such relations originated, or whether the trustee whose removal is sought, caused them by his own misconduct or not. *Quackenbush v. Southwick*, (1869) 41 N. Y. 117; *Matter of Rusk*, (1887) 44 Hun 630, 9 N. Y. St. Rep. 149. And the Supreme Court will remove a testamentary trustee on the ground that he has become an unsuitable person to execute the trust, where he is also a surviving partner of his testator, and there is substantial controversy as to accuracy of his inventory of the partnership affairs, so that his private interests as partner conflict with his duties as trustee. *Matter of Keller*, (1911) 142 App. Div. 454, 127 N. Y. S. 16, affirmed (1911) 201 N. Y. 590 mem. So, the refusal of a trustee to comply with a decree of the court makes out a prima facie case for his removal "for the court has undoubtedly the power by way of enforcing its previous decree to remove the trustee who will not convey and appoint one who will." *Harrison v. Union Trust Co.*, (1895) 144 N. Y. 326, 39 N. E. 353, affirming 80 Hun 463, 30 N. Y. S. 443. But the test of incompetency should be applied with caution to cases where inability to discharge the duties of the trust intelligently arises from bodily disease resulting in permanent impairment of mental and physical ability. *Matter of Leland*, (1916) 219 N. Y. 387, 114 N. E. 854, affirming 175 App. Div. 62, 161 N. Y. S. 316.

Jurisdiction of Supreme Court to remove trustee appointed by agreement of separation between husband and wife and to appoint another.—The Supreme Court has no jurisdiction, without the consent of the husband or the trustee, to remove the trustee appointed by an agreement of separation between husband and wife, which contains a covenant upon the part of the trustee to indemnify the husband against liability for debts contracted or to be contracted, by the wife, and to appoint another. *Hughes v. Cuming*, (1900) 165 N. Y. 91, 58 N. E. 794, reversing 36 App. Div. 302, 55 N. Y. S. 256.

Removal of testamentary trustee.—A Surrogate's Court can remove a testamentary trustee only for some one or all of the reasons stated in section 2569 of the Code of Civil Procedure, which are disqualification, incompetency which renders him unfit for the due execution of the trust, or some affirmative act to the detriment of the trust estate or its management. The Supreme Court has power to remove a testamentary trustee not only for the reasons which would justify such action in the Surrogate's Court, but also "for any other cause." *Pyle v. Pyle*, (1910) 137 App. Div. 568, 122 N. Y. S. 256, affirmed without opinion (1910) 199 N. Y. 538, 92 N. E. 1099. A testamentary trustee, compelled to account as executor, and then unable to show that he has in his possession the moneys with which he is chargeable, and who, in order to answer the charges made against him, hastily procures pieces of real estate, subject to taxes and incumbrances, to be conveyed to him by relatives, agents and employees, must be removed from the trusts as false to them, and so must a cotrustee, who consented to his acts although not sharing in them, as he cannot be a mere figurehead. *Matter of Mallon*, (1902) 38 Misc. 27, 76 N. Y. S. 879.

Effect of trustee's lunacy.—Where one of five trustees becomes a lunatic the remaining trustees cannot act as the survivors might do in case of the death of one of their number, but it is the duty of the lunatic's cotrustees to apply for his removal and for the appointment of another in his stead. *Bascom v. Weed*, (1907) 53 Misc. 496, 105 N. Y. S. 459.

Compensation of removed trustee.—Where a trustee violated his trust duties it was held that he was not entitled to the compensation provided in a will for the faithful performances of those services. *Widmayer v. Widmayer*, (1894) 76 Hun 251, 27 N. Y. S. 773.

Removal of trustee as reviewable.—Where upon an application for the removal of a testamentary trustee and the appointment of another in his place, the evidence tends to establish any of the causes for removal specified in the statute, the question of removal is one resting in the discretion of the surrogate. Where that officer, in the exercise of his discretion decides in favor of removal, the decision is subject to review upon appeal by the Supreme Court but if there is any evidence to sustain the decision, it is not reviewable by the Court of Appeals. *Matter of McGillivray*, (1893) 138 N. Y. 308, 33 N. E. 1077.

"Any person interested in the trust."—The statute was intended to embrace that class of persons who were immediately interested, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee. *Livingston's Petition*, (1866) 2 Abb. Pr. N. S. 1.

When trustee can be appointed.—A trustee of a trust fund can only be appointed under this section and then only when the trustee has resigned or been removed. *Jewett v. Schmitt*, (1903) 83 App. Div. 276, 82 N. Y. S. 49; *Brater v. Hopper*, (1894) 77 Hun 244, 28 N. Y. S. 472; *Matter of Schoonhoven*, (1836) 5 Paige 559.

Power of Supreme Court to appoint new trustees.—It is familiar law that upon the death or removal of an original trustee the trust devolves upon the Supreme Court, and it has jurisdiction to appoint new trustees to execute the trust. *Lozey v. Stanley*, (1895) 147 N. Y. 560, 42 N. E. 8, reversing 83 Hun 420, 31 N. Y. S. 950; *Royce v. Adams*, (1890) 123 N. Y. 402, 25 N. E. 386; *Greenland v. Waddell*, (1889) 116 N. Y. 234, 22 N. E. 367, 15 A. S. R. 400; *Rogers v. Rogers*, (1888) 111 N. Y. 228, 18 N. E. 636, affirming 18 Hun 409; *Cooke v. Platt*, (1885) 98 N. Y. 35; *Mott v. Ackerman*, (1883) 92 N. Y. 539; *Farrar v. McCue*, (1882) 89 N. Y. 139; *Delaney v. McCormack*, (1882) 88 N. Y. 174; *People v. Norton*, (1853) 9 N. Y. 176; *Ogilby v. Hickok*, (1911) 144 App. Div. 61, 128 N. Y. S. 860, affirming (1911) 202 N. Y. 614, 96 N. E. 1123; *Rankine v. Metzger*, (1902) 69 App. Div. 264, 74 N. Y. S. 649, affirmed without opinion (1903) 174 N. Y. 540, 66 N. E. 1115; *Rothschild v. Goldenberg*, (1901) 33 Misc. 646, 68 N. Y. S. 955, reversed on other grounds 58 App. Div. 293. And a trustee appointed by the court is governed in every respect by the same rules of law as one appointed by consent of the parties. *Matter of Baltes*, (1900) 51 App. Div. 491, 64 N. Y. S. 613.

Appointment of testamentary trustee.—The provision of the Code of Civil Procedure (§ 2638), which provides that when a sole testamentary trustee dies, or is removed or resigns, and the trust has not been fully executed, the Surrogate's Court may appoint a successor, is not limited to a case where there is but one such trustee; where there are more than one and all die or resign,

the surrogate has power to appoint a successor, and the Supreme Court also has authority to make such appointment. *Royce v. Adams*, (1890) 123 N. Y. 402, 25 N. E. 386.

Mode of appointing trustee.—The usual mode of appointing a new trustee is by petition. *De Witt v. Chandler*, (1860) 11 Abb. Pr. 459.

Appointment of original creator of trust.—It has been held that there is nothing to prevent a court having the power to appoint trustees from appointing the original creator of the trust as such. *Reed v. Allerton*, (1865) 3 Robt. 551.

Powers of substituted trustee.—The Supreme Court can confer all the powers of the original trustee upon the substituted trustee, and can exercise such jurisdiction as well in an action instituted for that purpose as upon petition. *Leggett v. Hunter*, (1859) 19 N. Y. 445, affirming 25 Barb. 81. But it may be doubted that a power to terminate a trust by paying over the whole of the principal to the beneficiary, regardless of the necessity of such a course for his proper maintenance, would pass to a substituted trustee, where the power is merely to provide liberally for the beneficiaries from the income and principal. *Donlin v. Hynes*, (1917) 177 App. Div. 184, 163 N. Y. S. 868.

Distinction between express and implied trusts.—Implied trusts are well known in the law as contradistinguished from express trusts and are classified under a distinct head. Express trusts are created by deed or will; implied trusts arise in general by construction of law upon the acts or situation of the parties. *Johnson v. Fleet*, (1835) 14 Wend. 176. And a trust estate will not be implied when to do so creates a conflict between a will and the statute, and when the duties imposed upon the executor may be executed under a trust power. *Henderson v. Henderson*, (1889) 113 N. Y. 1, 20 N. E. 814, reversing 46 Hun 509, 12 N. Y. St. Rep. 577.

Cited.—This section was cited in *Lahey v. Kortright*, (1892) 132 N. Y. 450, 30 N. E. 989.

§ 113. Grants and devises of real property for charitable purposes. 1. No gift, grant, or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, or devised for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

2. The supreme court shall have control over gifts, grants and devises in all cases provided for by subdivision one of this section, and whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any

specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property, if he be living.

3. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts.

Subdivision 1 was derived from L. 1893, ch. 701, § 1; subdivision 2 was derived from L. 1893, ch. 701, § 2 pt., as amended by L. 1901, ch. 291, § 1; subdivision 3 was derived from L. 1901, ch. 291, § 1 pt. Subdivision 2 was amended by L. 1909, ch. 114, which struck out the words "until the expiration of at least twenty-five years after the execution of the instrument or," preceding the words "without the consent" near the end of the subdivision. The report of the Board of Statutory Consolidation (1907), page 4902, has the following note relating to this section: "Section 93 of the 'old' Real Property Law was nothing but a paraphrase of L. 1893, Ch. 701. Instead of such paraphrase it would seem best to re-enact L. 1893, Ch. 701, as amended by L. 1901, Ch. 291, and then to repeal both L. 1893, Ch. 701, and L. 1901, Ch. 291. Otherwise we have two statutes on the statute book, both relating to the same thing and both phrased in slightly different language. By this course, no change whatever will be made in the substance of existing law."

Section 113 of the Real Property Law of 1896 is now covered by section 133.

Certain grants for charitable uses regulated: see *infra*, § 115.

Application of section to trust powers: see *infra*, § 182.

Gifts and bequests of personal property for charitable purposes: see **PERSONAL PROPERTY LAW**, § 12.

Limitation on devise or bequest to certain societies, associations and corporations: see **DECEDENT ESTATE LAW**, § 17.

Historical review.—The rise and development of the law of charitable uses furnishes a most interesting chapter in the history of our equity jurisprudence. Its purpose was to obviate the strict rule of the common law which condemned trusts unless the beneficiaries were so named or identified that they would have a standing in court to enforce the same, and it existed in England as early as the Norman Conquest and continued down to the time of the American Revolution. In such cases the Court of Chancery, upon motion of the attorney-general or of the interested parties, assumed jurisdiction of the trust and directed a distribution of the charity as nearly as possible in accordance with the wishes of the testator. To that end a master would be appointed to devise a scheme for such administration, and thus was brought into operation what was known as the *cy pres* doctrine, whereby the administration of the charity was carried out with as close approximation to the scheme of the testator as was reasonably practicable. This doctrine of charitable uses was the subject of more or less legislation by Parliament, which finally by statute (43 Eliz. Ch. 4), known as the "statute of charitable uses," declared and defined the subjects for such uses and provided for the execution of the same. This statute of Elizabeth was repealed in our state upon its organization by the act of 1788, and it was long a mooted question in our courts whether, because of such repeal, the doctrine of charitable uses was ever ingrafted into the jurisprudence of this state. Judges of great learning and ability differed upon the subject, some holding that it existed before the statute of Elizabeth, the purpose of that statute being for its regulation only, and therefore such repeal left the doctrine in full force and effect. This view led to the decision of *Williams v. Williams*, [1853] 8 N. Y. 525, which held that the law of charitable uses, as it existed in England prior to the Revolution, was in full force and effect in this state. On the contrary, it was contended that such a law was contrary to the purposes of our statutes, which was to regulate and administer charities through regular organized corporations, and therefore the repeal of the statute of Elizabeth showed an intention to abrogate the entire doctrine of charitable uses. This latter view finally prevailed, and eventually resulted in the decision of *Holmes v. Mead*, [1873] 52 N. Y. 332, which overruled the *Williams* case and decided that the doctrine of charitable uses, as known in England prior to the American Revolution, had no place in our law. It is considered unnecessary

to review the numerous decisions of the courts prior to the enactment of the "Tilden Act," so called, now section 12 of the Personal Property Law and section 113 of the Real Property Law. The cases were collated and considered in *Holland v. Alcock*, (1888) 108 N. Y. 312, 16 N. E. 305, 2 A. S. R. 420, reversing 40 Hun 372, and again holding that the English doctrine of trusts for charitable purposes, as distinguished from private trusts governed by the general rules of law, and the doctrine of *cy pres*, did not prevail in this state. That decision was followed by the courts of this state, resulting in the failure of numerous trusts for charitable purposes, including a trust under the will of Samuel J. Tilden, reported in *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382. Soon after the decision of that case the legislature enacted chapter 701 of the Laws of 1893 (Tilden Act), which is substantially contained in the language of the sections of the Personal Property Law and of the Real Property Law above referred to. In construing the statute the Court of Appeals has held that the legislature intended by that act to restore the law of charitable trusts as declared in the Williams case above referred to. *Sailors' Snug Harbor v. Carmody*, (1914) 211 N. Y. 286, 105 N. E. 543, affirming 158 App. Div. 738, 144 N. Y. S. 24; *Utica Trust, etc., Co. v. Thomson*, (1914) 87 Misc. 31, 149 N. Y. S. 392. See also *Bowman v. Domestic, etc., Missionary Soc.*, (1905) 182 N. Y. 494, 75 N. E. 535, modifying 100 App. Div. 29, 90 N. Y. S. 898; *Matter of Graves*, (1902) 171 N. Y. 40, 63 N. E. 787, reversing 66 App. Div. 267, 72 N. Y. S. 815; *Matter of Griffin*, (1901) 167 N. Y. 71, 60 N. E. 284, reversing 45 App. Div. 102, 61 N. Y. S. 639; *Allen v. Stevens*, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8; *People v. Powers*, (1895) 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502, reversing 83 Hun 449, 31 N. Y. S. 1131; *Loch v. Mayer*, (1906) 50 Misc. 442, 100 N. Y. S. 837. And as was said in *Dammert v. Osborn*, (1893) 140 N. Y. 30, 35 N. E. 407, reversing 65 Hun 585, 20 N. Y. S. 474: "This statute indicates an intention on the part of the legislature to enforce and uphold charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in *Williams v. Williams* (8 N. Y. 525)." See also *Morgan v. Durand*, (1906) 51 Misc. 523, 101 N. Y. S. 1002. Following the decision in *Allen v. Stevens*, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8, the statute was further amended by increasing the power of the court in dealing with indefinite charitable trusts. This amendment was made by chapter 291 of the Laws of 1901, and was substantially re-enacted in 1909 in the Personal Property Law, section 12, and the Real Property Law, section 113. See *Utica Trust, etc., Co. v. Thomson*, (1914) 87 Misc. 31, 149 N. Y. S. 392.

Cy pres doctrine.—The doctrine of *cy pres*, which was part of the law of charitable uses developed by common law and stated in Statute 43 Eliz., chap. 4, has been stated in *Pomeroy on Equity Jurisprudence* (3d ed., § 1027) as follows: "Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy pres*, and will apply the fund to some charitable purposes similar to those (if any) mentioned by the donor. 'If the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects which happen to fail from whatever cause—even though in such cases the particular mode of operation contemplated by the donor is uncertain or impracticable—yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality or failure of its immediate objects, be carried into effect.'" And the section controls every application of this doctrine. See *Loch v. Mayer*, (1906) 50 Misc. 442, 100 N. Y. S. 837.

Section as authorizing express trust.—Section 96 provides for only four express trusts, but since the enactment of this section a trust for religious, educational, charitable or benevolent uses has been referred to as the fifth express trust authorized by law. *Decker v. Vreeland*, (1917) 220 N. Y. 326, 115 N. E. 989, reversing 170 App. Div. 231, 156 N. Y. S. 442.

Rule as to trust for uncertain beneficiary.—A trust for an indefinite or uncertain beneficiary was formerly held void. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591;

Fairchild v. Edson, (1897) 154 N. Y. 199, 48 N. E. 541, 61 A. S. R. 609, affirming 77 Hun 298, 28 N. Y. S. 401, modifying **Edson v. Bartow**, (1896) 10 App. Div. 104, 41 N. Y. S. 723; **Read v. Williams**, (1891) 125 N. Y. 560, 26 N. E. 730, 21 A. S. R. 748; **Bascom v. Albertson**, (1866) 34 N. Y. 584, affirming 1 Redf. 340; **Levy v. Levy**, (1865) 33 N. Y. 97, reversing 40 Barb. 585. See also **Fosdick v. Hempstead**, (1891) 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, reargument denied (1891) 126 N. Y. 651, 27 N. E. 382. But the statute now provides for the case of a failure to select a trustee and also for the case of indefiniteness of beneficiary. **Allen v. Stevens**, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8; **Hughes v. Stoutenburgh**, (1915) 168 App. Div. 512, 154 N. Y. S. 65; **Stewart v. Franchetti**, (1915) 167 App. Div. 541, 153 N. Y. S. 453; **Ely v. Ely**, (1914) 163 App. Div. 320, 148 N. Y. S. 691; **Warburton Ave. Baptist Church v. Clark**, (1913) 158 App. Div. 230, 142 N. Y. S. 1089; **Matter of Miller**, (1912) 149 App. Div. 113, 133 N. Y. S. 828; **Manley v. Fiske**, (1910) 139 App. Div. 665, 124 N. Y. S. 149, affirmed without opinion (1911) 201 N. Y. 546, 95 N. E. 1133. Nevertheless the purposes of the trust and the beneficiary must be so identified that a court of equity would have power to enforce the execution thereof. **Matter of Shattuck**, (1908) 193 N. Y. 446, 86 N. E. 455, reversing 118 App. Div. 888, 103 N. Y. S. 520; **Fosdick v. Hempstead**, (1891) 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, reargument denied (1891) 126 N. Y. 651, 27 N. E. 382; **Utica Trust, etc., Co. v. Thomson**, (1914) 87 Misc. 31, 149 N. Y. S. 392. See also **Starr v. Selleck**, (1911) 145 App. Div. 869, 130 N. Y. S. 693, affirmed (1912) 205 N. Y. 545 mem.; **Matter of Wheeler**, (1898) 32 App. Div. 183, 52 N. Y. S. 943, affirmed without opinion (1900) 161 N. Y. 652, 57 N. E. 1128; **Matter of Philbrick**, (1911) 74 Misc. 327, 134 N. Y. S. 235.

Retroactive effect of section.—It has been held that the section is not retroactive in its provisions, and has no application to a case arising prior to its enactment. **Butler v. Parochial Fund of Protestant Episcopal Church**, (1895) 92 Hun 96, 36 N. Y. S. 562. Thus a bequest of money to a church in trust to invest and use the proceeds in the purchase of material for garments for poor children to enable them to attend the Sabbath school, and made by a testator who died prior to the passage of chapter 701 of the Laws of 1893, was held void on account of indefiniteness of the beneficiaries. **Simmons v. Burrell**, (1894) 8 Misc. 388, 28 N. Y. S. 625. But the statute is general in its terms, and not limited to wills made or probated since its enactment. **Morgan v. Durand**, (1906) 51 Misc. 523, 101 N. Y. S. 1002.

Construction in favor of trust.—Where a will by which a trust is attempted to be created is susceptible of more than one construction, a construction which is fairly within the rules of law and that sustains the trust and devotes the fund included therein to purposes permitted by law and to the good of humanity should be preferred. **Matter of Robinson**, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259. See also **Manley v. Fiske**, (1910) 139 App. Div. 665, 124 N. Y. S. 149, affirmed without opinion (1911) 201 N. Y. 546, 95 N. E. 1133; **Utica Trust, etc., Co. v. Thomson**, (1914) 87 Misc. 31, 149 N. Y. S. 392; **Matter of Stiney**, (1913) 81 Misc. 389, 143 N. Y. S. 351. And the principle is now firmly established that if a charitable purpose pervades and dominates the bequest or devise, the scheme and purpose of the testator should be upheld and enforced. **Torrey v. Day**, (1913) 81 Misc. 39, 141 N. Y. S. 814; **Matter of Davis**, (1912) 77 Misc. 72, 137 N. Y. S. 427; **Hull v. Pearson**, (1899) 36 App. Div. 224, 55 N. Y. S. 324.

Application of section to powers.—It has been held that the section applies as well to powers as to trusts, as the term "grant" properly includes the creation of a power as it does a direct devise. **Kelly v. Hovey**, (1898) 35 App. Div. 273, 55 N. Y. S. 94.

Necessity of corporation or individual to execute trust.—Under the provisions of the section a testator may name a corporation as trustee, or provide that a corporation to be founded shall act as trustee, or the trustee named may be an individual; but if he name none of these the statute provides in effect that the trust shall not fail, but the title to the property devised or bequeathed in trust shall vest in the Supreme Court, which shall

have control over gifts, grants, bequests and devises provided for by the act. *Allen v. Stevens*, (1899) 161 N. Y. 122, 55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8. But a corporation cannot be selected as a beneficiary, unless it accepts the gift as a charitable one, and is in need and worthy of it. It cannot accept it for any other purpose than a charitable purpose, and the Supreme Court has the power and is charged with the duty of seeing that the moneys shall be devoted solely for charitable purposes among the needy and worthy. A worthy person, corporation, association, or institution can have any part of it, except as a charitable gift; that is, for a charitable use. *Matter of Groot*, (1916) 173 App. Div. 436, 159 N. Y. S. 1003.

Bequests or devises to unincorporated associations or societies.—An unincorporated association or society is incompetent to take or hold property by bequest or devise. *Mount v. Tuttle*, (1906) 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428, affirming 99 App. Div. 433, 91 N. Y. S. 195; *Matter of Gray*, (1913) 81 Misc. 79, 142 N. Y. S. 1067; *Matter of Compton*, (1911) 72 Misc. 289, 131 N. Y. S. 183. See also *Wait v. Society for Political Study*, etc., (1910) 68 Misc. 245, 123 N. Y. S. 637; *Matter of Powell*, (1910) 136 App. Div. 830, 121 N. Y. S. 779; *Catt v. Catt*, (1907) 118 App. Div. 742, 103 N. Y. S. 740. And the section did not change the rule that an unincorporated association has no power to take or hold a charitable bequest either absolutely or as a trustee. *Fralick v. Lyford*, (1905) 107 App. Div. 543, 95 N. Y. S. 433, affirmed without opinion (1907) 187 N. Y. 524, 79 N. E. 1105; *Matter of Scott*, (1900) 31 Misc. 85, 64 N. Y. S. 577; *Matter of Collier*, (1916) 97 Misc. 543, 163 N. Y. S. 402. But the contrary rule has been held. *Matter of Fitzsimmons*, (1899) 29 Misc. 731, 62 N. Y. S. 1009. See also *Matter of Fitzsimmons*, (1899) 29 Misc. 204, 61 N. Y. S. 485.

Subsequent creation of corporation to enforce trust.—A gift for the uses specified in the statute may, under the direction of the will, be administered and enforced by and through a corporation subsequently created for that purpose. *Matter of Robinson*, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259; *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Southampton Hospital Ass'n v. Fordham*, (1911) 72 Misc. 247, 131 N. Y. S. 61.

Devise to corporation which has ceased to exist.—Where a corporate body in existence when a will was executed, was designated as trustee, and had afterwards ceased to exist before the will became operative, it was held that the gift vested in the Supreme Court to be administered according to the directions of the testator. *In re Deming*, (1908) 112 N. Y. S. 170.

Gift to religious corporation for care of burial lot.—A gift of a testator's residuary estate to a religious corporation, to use the income therefrom in caring for his burial plot, cannot be regarded as for a charitable use within the meaning of the section. *Driscoll v. Hewlett*, (1910) 198 N. Y. 297, 91 N. E. 784, affirming 132 App. Div. 125, 116 N. Y. S. 466; *Matter of Waldron*, (1907) 57 Misc. 275, 109 N. Y. S. 681.

Gifts to private institutions or individuals.—Gifts for the benefit of private institutions or individuals were not intended to be included within the provisions of the section. The law requires that the use shall be public, that the benefit shall be intended not for individuals as such but as representatives of a class; that the altruistic aim shall not be a cover for the bestowal of a private bounty. *Matter of Robinson*, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259; *Matter of Shattuck*, (1908) 193 N. Y. 446, 86 N. E. 455, reversing 118 App. Div. 888, 103 N. Y. S. 520; *Matter of Altman*, (1914) 87 Misc. 255, 149 N. Y. S. 601; *Smith v. Havens Relief Fund Soc.*, (1904) 44 Misc. 594, 90 N. Y. S. 168, affirmed 118 App. Div. 678, 103 N. Y. S. 770, and affirmed without opinion (1908) 190 N. Y. 557 mem., 83 N. E. 1132; *Butterworth v. Keeler*, (1915) 169 App. Div. 136, 154 N. Y. S. 744.

Testamentary trust to acquire lands for religious purposes in foreign state.—Where a testatrix who resided in this state bequeathed to the bishop of the Protestant Episcopal church in Utah and Idaho, in his corporate capacity, and to his successor or successors in office, certain sums, "in trust, nevertheless, to erect therewith, at such place within the limits of his jurisdiction as he or his successor or successors shall select," a church and rectory which

shall "be the property of such Protestant Episcopal jurisdiction." the object of the trust was held to be the acquisition of lands in the state of Utah or in the state of Idaho, so that the execution of the trust depended entirely upon its validity under the laws of the state in which the land was to be acquired and held, or on the competency of the donee, upon whom the title was to be conferred, to take and hold lands within that state. *Mount v. Tuttle*, (1906) 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428, affirming 99 App. Div. 433, 91 N. Y. S. 195. See also *Smith v. Chesebrough*, (1903) 176 N. Y. 317, 68 N. E. 625, reversing 82 App. Div. 578, 81 N. Y. S. 570; *Matter of Miller*, (1912) 149 App. Div. 113, 133 N. Y. S. 828. The purpose of subdivision 1 was "not to abrogate, but to modify, the common-law rule in its application to trusts for religious, educational, charitable and benevolent uses which the courts had theretofore applied as a test of their validity to gifts and grants in trust to be administered in this state, namely, that there must be a beneficiary either named in the instrument creating the trust, or capable of being ascertained within the rule of law applicable in such cases. . . . The statute was not intended to apply to a foreign trust, that is to say, one that was to be executed in a foreign state or country, no matter what its purposes were." The validity of a trust to be executed outside of this state, when the identity of the beneficiary has been ascertained, must be determined by the law of the place where the trust is to be executed. *Matter of Crum*, (1916) 98 Misc. 160, 164 N. Y. S. 149.

Limitation as to educational uses.—The language of the statute does not confine educational uses to such as are general, as charity includes any department or extent of education primarily and fairly calculated to make the recipient self-supporting. "A gift is not without the bounds of charity because the training contemplated thereby may include special or specific education." *Matter of Robinson*, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259. See also *Rothschild v. Schiff*, (1907) 188 N. Y. 327, 80 N. E. 1030, modifying 103 App. Div. 235, 92 N. Y. S. 1076. But an educational institution is not necessarily a public or charitable institution, as it may be organized as a stock corporation and be conducted wholly for the profit of the stockholders. *Matter of Shattuck*, (1908) 193 N. Y. 446, 86 N. E. 455, reversing 118 App. Div. 888, 103 N. Y. S. 520.

Non-resident beneficiaries.—Trusts otherwise valid under the statutes are sustained, although the beneficiaries are not necessarily or in terms confined to residents of this state. *Matter of Robinson*, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259. See also *St. John v. Andrews Institute for Girls*, (1908) 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modifying 117 App. Div. 698, 102 N. Y. S. 808; *Manley v. Fiske*, (1910) 139 App. Div. 665, 124 N. Y. S. 149, affirmed without opinion (1911) 201 N. Y. 546, 95 N. E. 1133. Thus a bequest in trust to be used for free scholarships in an incorporated theological school in France was held to be a legal bequest for charitable uses under the laws of this state. *Matter of Miller*, (1912) 149 App. Div. 113, 133 N. Y. S. 828. And in *Matter of Sturgis*, (1900) 164 N. Y. 485, reversing 48 App. Div. 624, 62 N. Y. S. 1148, which affirmed 8 Misc. 110, 59 N. Y. S. 783, a bequest of the remainder in a fund, after the death of a life beneficiary, to the selectmen or other municipal authorities of a certain town, in trust to apply the income in their discretion for the relief of respectable native-born persons in reduced circumstances who were not wholly dependent upon the town or parish for their support, was held valid, though the official authorities could not as such accept the trust, their appointment being deemed to be a designation of individual trustees by official name.

Power of court to appoint trustee.—Where the trustee is not indicated with sufficient certainty or correctness the Supreme Court has power to name a trustee. *Kingsbury v. Brandegee*, (1906) 113 App. Div. 606, 100 N. Y. S. 353.

Appointment of attorney-general as trustee.—It is improper to appoint the attorney-general trustee of a charitable trust, as the statutes require him to act in another capacity. *Manley v. Fiske*, (1910) 139 App. Div. 665, 124 N. Y. S. 149, affirmed without opinion (1911) 201 N. Y. 546, 95 N. E. 1133.

Duties of attorney-general.—In *Allen v. Stevens*, (1899) 161 N. Y. 122,

55 N. E. 568, reversing 33 App. Div. 485, 54 N. Y. S. 8, it was said that the effect of the statute was to confer all power over such trusts and trustees on the Supreme Court and to direct the attorney-general "to represent the beneficiaries in cases within the purview of the statute as was the practice in England." And this imposes upon the attorney-general the duty to enforce the trust, which implies the duty to protect it, and it cannot be protected by him in an action expressly framed to test the validity of the devise or bequest, out of which it arises unless he acquires a status as the representative of the beneficiaries. That can only be done by his being made a party to the action, and it is his office to see to the establishment of the trust, if valid, for a beneficiary to be selected by the trustees; if they make no selection, then to take proper proceedings in court to enforce the trust. *Rothschild v. Goldenberg*, (1901) 58 App. Div. 499, 69 N. Y. S. 523.

Trusts declared valid.—Where the will of a testator provided: "Second, I give and bequeath to my said executors and trustees, hereinafter named, the sum of fifty thousand dollars to be by them applied in their best judgment and discretion to such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my said executors may select, and in such sums respectively as they may deem proper," it was held that these provisions were capable of being enforced by judicial decree and were valid. *Matter of Cunningham*, (1912) 206 N. Y. 601, 100 N. E. 437, affirming 151 App. Div. 940, 135 N. Y. S. 1107. A devise to an association to be used "in aiding and assisting needy young women students" at a certain university was held enforceable as a valid charitable trust. *Sawyer v. Dearstyne*, (1912) 139 N. Y. S. 955. And where a testatrix directed her trustees to disburse the principal or interest of her residuary estate, or both, in their discretion "To provide shelter, necessities of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same," and authorized her trustees to carry out such provisions or to cause to be created a corporation therefor, it was held that the purpose of the testatrix was within the language of the statute, and that the courts could, at the suit of the attorney-general, compel the trustees to carry out the will according to such purpose and for such uses. *Matter of Robinson*, (1911) 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, modifying 145 App. Div. 925, 130 N. Y. S. 259. A devise "to be used towards the purpose of maintaining a clubhouse or clubrooms for the social resort of young men and boys upon the west side of the city of New York, borough of Manhattan, or to the purposes of similar work, social or educational, for such young men or boys, as individuals," was held valid under the section. *Starr v. Selleck*, (1911) 145 App. Div. 869, 130 N. Y. S. 693, affirmed (1912) 205 N. Y. 545 mem. A will disposing of the residuary estate in the following words: "I desire my executors to divide the surplus among such American charities as they may think well of, and I would like these sums to be given to any society that assist poor needlewomen (seamstresses) whose toil is so poorly requited. If no such organization exists the money is to be divided for the benefit of incapacitated sailors and their families," was held to create a valid trust. *Manley v. Fiske*, (1910) 139 App. Div. 665, 124 N. Y. S. 149, affirmed without opinion (1911) 201 N. Y. 546, 95 N. E. 1133. A bequest to the treasurer of a hospital "in trust, to be used as she may deem best" towards the interest of the same, was held valid. *Matter of Beaver*, (1909) 62 Misc. 255, 116 N. Y. S. 424. A bequest "to the priest of St. Mary's Church of Lancaster, New York, for which Masses shall be said for the repose of my soul, and that of my husband, and all my relatives and benefactors," was held not to be void for the indefiniteness of the beneficiary. *Matter of Zimmerman*, (1898) 22 Misc. 411, 50 N. Y. S. 395. See also *Matter of Eppig*, (1909) 63 Misc. 613, 118 N. Y. S. 683. A testamentary direction that "I hereby direct my said trustees to divide the rest, residue, and remainder of my estate, after the payment of the above-mentioned legacies, to or among any poor family or families, or any charitable organization or organizations, in the city of Brooklyn, which shall seem to them most deserving of reward or assistance," was held not invalid on account of indefiniteness of the beneficiaries. *Kelly v. Hoey*, (1898) 35 App. Div. 273, 55 N. Y. S. 94.

Trusts declared invalid.—A bequest to an individual to be used "in the Lord's work" was held not sufficiently to indicate the charitable purpose to

which the testator desired the gift applied, so as to enable the Supreme Court to administer the trust. *Matter of Compton*, (1911) 72 Misc. 289, 131 N. Y. S. 183. A devise to an individual "to use as he may desire in the Master's work" was held invalid as not showing in what manner or for whose benefit the devise was to be used. *Matter of Seymour*, (1910) 67 Misc. 347, 124 N. Y. S. 637. A bequest of money in trust which contemplated a profitable money lending business, although productive of a certain degree of benevolence, was held not to be a charitable use within the meaning of the section. *Tayshanjian v. Abbott*, (1908) 59 Misc. 642, 112 N. Y. S. 583, modified and affirmed 130 App. Div. 863, 115 N. Y. S. 938, affirmed (1911) 200 N. Y. 374. A devise in trust for the use and benefit of two institutions, "for the purpose of having masses and prayers read and said for the benefit of my soul, each institution to them equally," was held not to constitute a valid trust under the section. *Matter of Cooney*, (1906) 112 App. Div. 659, 98 N. Y. S. 676. A devise to "Pickering White Library and Chime Tower and Bells at Sacket's Harbor, New York," was held invalid, there being no such person or persons, either natural or artificial as the said library, tower and bells." *Spencer v. De Witt C. Hay Library Ass'n*, (1901) 36 Misc. 393, 73 N. Y. S. 712.

Cited.—This section was cited in *Matter of Watson*, (1902) 171 N. Y. 356, 63 N. E. 1109, reversing 70 App. Div. 623, 75 N. Y. S. 1143; *Matter of Moses*, (1910) 138 App. Div. 525, 123 N. Y. S. 443; *Boenhardt v. Loch*, (1908) 129 App. Div. 355, 113 N. Y. S. 747 (dissenting opinion per Ingraham, J.), affirmed without opinion (1910) 198 N. Y. 631, 92 N. E. 1078; *Matter of Goetz*, (1907) 120 App. Div. 10, 104 N. Y. S. 832; *United States Trust Co. v. Chauncey*, (1900) 32 Misc. 358, 66 N. Y. S. 563.

§ 114. Certain educational and other charitable uses authorized. 1. Real property may be granted, devised, and conveyed to any incorporated college or other literary incorporated institution in this state, to be held in trust for any one or more of the following purposes:

- (1) To establish and maintain an observatory;
- (2) To found and maintain professorships and scholarships;
- (3) To provide and keep in repair a place for the burial of the dead; or
- (4) For any other specific purposes comprehended in the general objects authorized by their respective charters.

The said trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustee, and all property which shall hereafter be granted to any incorporated college or other literary incorporated institution in trust for any of the aforesaid purposes, may be held by such college or institution upon such trusts, and subject to such conditions and visitations as may be prescribed and agreed to as aforesaid.

2. Real estate may be granted, devised, and conveyed to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purpose of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation

may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

3. Real estate may be granted or devised, to commissioners of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such district.

4. The trusts authorized by this section may continue for such time as may be necessary to accomplish the purpose for which they may be created.

This section was derived from L. 1840, ch. 318, §§ 1-4 and L. 1841, ch. 261, § 1.

Section 114 of the Real Property Law of 1896 is now covered by section 134.

Accumulations for purposes created by this section: see *supra*, § 61.

Certain education and other charitable uses of personal property authorized: see PERSONAL PROPERTY LAW, § 13.

Trusts for schools: see EDUCATION LAW, § 520 et seq; STATE FINANCE LAW, § 39.

Trusts for parks and libraries in villages and towns: see GENERAL MUNICIPAL LAW, art. 7.

Power of cities to take real property by grant or devise absolutely or in trust for any public or municipal purpose: see GENERAL CITY LAW, § 20.

Right of trustees of Masonic lodge to take and hold real property: see BENEVOLENT ORDERS LAW, § 3; Laws of 1886, ch. 317.

Limitation on devises or bequests for educational or charitable purposes: see DECEDENT ESTATE LAW, § 17.

Devise or bequest as a trust.—A corporation created for charity may take by bequest and hold personal property limited by the testator to any of the corporate uses of the legatee, and a direction of the testator that the principal shall be kept inviolate and the income only be expended will not invalidate the bequest, provided it is fixed and certain, and gives an immediate and vested interest. Such a bequest is not affected by the provisions of the statutes against perpetuities, nor does it create a trust, as that term is applied to property. The income only of the permanent endowment of such a corporation can be used with safety, and the corporation can use the legacy in accordance with the law of its creation for its own purposes. The dictation by the donor of the manner of its use within the law does not affect the ownership or make the corporation a trustee. *Wetmore v. Parker*, (1873) 52 N. Y. 450, affirming 7 Laus. 121. And the bequest to an educational, charitable or religious corporation in trust for the promotion of some one of its chartered purposes is not a trust in a legal sense. A party cannot be trustee for himself. It is a benefaction given in confidence that the beneficiary will observe the benefactor's expressed wishes respecting it, and the beneficiary by accepting it agrees to do so. *Bird v. Merkle*, (1895) 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423, reversing *Schell v. Merkle*, (1894) 75 Hun 74, 26 N. Y. S. 1021. But where a will gave the testator's library and the proceeds of his residuary estate "to the mayor of the city of New York, the president of the New York Academy of Medicine, the president of the College of Physicians and Surgeons of the city of New York and their successors, . . . in trust forever," for the purpose of "the establishment and maintenance, perpetuation and improvement" of a free library "without admixture or amalgamation with any other library, collection or institution," it was held that the trust attempted to be created was invalid, as an unlawful suspension of the power of alienation, and that the gift was to the individuals who should from time to time occupy the official position named, not to the corporations of which they were officers. *Cottman v. Grace*, (1889) 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145, reversing 41 Hun 345, 2 N. Y. St. Rep. 630.

When devise constitutes absolute gift and not a trust.—A will giving upon the death of testator's wife the residue of his estate, real and personal, "to the Round Lake Association, heretofore known as the Round Lake Camp Meeting Association of the Methodist Episcopal Church of the Troy Conference," subject to an estate for life of his sister-in-law in specified property,

"the amount so hereby given to said association to be prudently invested by it, and the income and profits arising therefrom to be devoted to and applied by said association to the support and maintenance of the school at said Round Lake, known as the Round Lake Summer Institute," which was an incorporated academy, was held not to create a trust in favor of said institute, but to constitute an absolute gift to the association for its own benefit, where it appeared from the terms of the will, taken as a whole, and the situation of the parties, that the testator intended to give his property to the association to maintain its own school and not as trustee for the benefit of another. *Matter of Griffin*, (1901) 167 N. Y. 71, 60 N. E. 284, reversing 45 App. Div. 102, 61 N. Y. S. 639.

Devises to trustees for purpose of founding library or school.—Devises or bequests to trustees for the purpose of founding a library or school have been held to create legal and valid trusts. *Betts v. Betts*, (1878) 4 Abb. N. Cas. 317.

Trust for care of cemetery lot.—Under the provisions of section 113 and of this section a trust for the purpose of lettering a cemetery monument and the perpetual care of the lot is not invalid, if the same is to be administered within this state. *Matter of Perkins*, (1910) 68 Misc. 255, 124 N. Y. S. 998.

Testamentary gift to a town.—A bequest to a town, in trust, in perpetuity for the benefit of the poor of the town, not confined to those for whose support the town is under a statutory liability, is invalid for want of an ascertained beneficiary, and in the absence of a special grant of power by statute, a town cannot act as trustee of property given for charitable purposes. A testamentary gift to a town, in order to take effect as an absolute one, must be for some one or all of the purposes for which the corporation was created. *Fosdick v. Hempstead*, (1891) 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, reargument denied (1891) 125 N. Y. 651, 27 N. E. 382, 37 N. Y. St. Rep. 130. See also *Iseman v. Myres*, (1882) 25 Hun 651.

Mortmain policy of the state.—The mortmain policy of this state is very simple, and is illustrated in the charters of our religious and charitable corporations. The amount of property which they may take and hold in mortmain is restricted; but their ownership is absolute and only qualified by their artificial nature. *Bird v. Merkle*, (1895) 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423, reversing *Schell v. Merkle*, (1894) 75 Hun 74, 26 N. Y. S. 1021. And by the terms of the statute no limit in amount or value of property, which can thus be given in trust is prescribed. But the statute is in no sense repugnant to the general law of the state, limiting and restricting the amount and value of property, which can be taken and held by literary and educational corporations, and the general laws are in harmony with the policy of the state, which has been uniform and consistent so far as such policy is indicated by legislation in relation to gifts in mortmain, and the powers of corporations to take and hold property. Special trusts were authorized to be created in furtherance of the general objects of the institutions named, but such trusts can be created, and full effect given to the acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. *Chamberlain v. Chamberlain*, (1871) 43 N. Y. 424, modifying 3 Laus. 318. See also *Levy v. Levy*, (1865) 33 N. Y. 97, reversing 40 Barb. 585. Thus where, in a special charter granted to an institution of learning, a limitation is put upon its power to hold property, in the absence of some plain and controlling circumstance showing a contrary legislative intent it must be construed as limiting the taking as well as holding beyond the amount specified; and a devise or bequest to it exceeding the amount or value it is permitted to take is void for the excess. *Matter of McGraw*, (1888) 111 N. Y. 66, 49 N. E. 233, 2 L. R. A. 387, affirming 45 Hun 354, 10 N. Y. St. Rep. 495, affirmed (1890) 136 U. S. 152, 10 S. Ct. 775, 34 U. S. (L. ed.) 427.

"For any other specific purposes."—While no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise, the section does not attempt to limit the purpose for which a devise may be received. *Currin v. Fanning*, (1878) 42 Hun 458. See also *King v. Rundle*, (1853) 15 Barb. 139. But where the objects of the corporation which claimed a devise in controversy were, "to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere;" it was held that it could not be sustained as a charitable devise on account of the generality of the object. *Owens v. Missionary Soc. of M. E. Church*, (1856) 14 N. Y. 389, 67 Am. Dec. 160.

§ 114-a. Trusts for care of cemetery lots, et cetera. Gifts, grants and devises of real property, in trust for the purpose of applying the proceeds or income thereof to the perpetual care and maintenance, improvement or embellishment of private burial lots in cemeteries, and the walks, fences, monuments, structures and tombs thereon, are permitted and shall be deemed to be for charitable and benevolent uses; and shall not be deemed to be invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries in the instrument creating the same, nor shall they be deemed invalid as violating any existing laws against perpetuities or suspension of the power of alienation of title to property. But nothing herein contained shall affect any existing authority of the courts to pass upon the reasonableness of the amount of such gift, grant or devise.

New. Added by L. 1909, ch. 218, § 2, in effect April 20, 1909.

Suspension of power of alienation: see *supra*, § 42.

Lands used for cemetery purposes not to be sold or mortgaged: see *infra*, § 450.

Trusts for care of cemetery lots: see PERSONAL PROPERTY LAW, § 13a.

Acquisition of property by religious corporations for cemetery purposes: see RELIGIOUS CORPORATIONS LAW, § 7.

Village cemetery property in trust: see VILLAGE LAW, § 295.

Purpose and scope of section.—The section authorizes trusts for the care of cemetery lots and classifies them with charitable and benevolent uses; validating them, irrespective of indefiniteness of the beneficiaries, or of their perpetuity. *Driscoll v. Hewlett*, (1910) 198 N. Y. 297, 91 N. E. 784, affirming 132 App. Div. 125, 116 N. Y. S. 466. And the section, and section 13a of the Personal Property Law, relate to private burial lots and not to public cemeteries. *Matter of Lyon*, (1916) 173 App. Div. 473, 159 N. Y. S. 951.

Validity of devise under Religious Corporations Law.—A gift of a testator's residuary estate to a religious corporation, to use the income therefrom in caring for his burial plot in the cemetery connected therewith, was held not void as involving perpetuity, by reason of the statute in force at the time of the testator's death (Religious Corporations Law, § 7), which authorized a religious corporation to receive real property for the purposes of a cemetery and to take and hold any property in trust for the care and preservation of such cemetery or any lot therein. *Driscoll v. Hewlett*, (1910) 198 N. Y. 297, 91 N. E. 784, affirming 132 App. Div. 125, 116 N. Y. S. 466.

Unlawful trust in perpetuity.—Where a testator ordered a sale of his real estate by his executor, and from the proceeds thereof and from the personal property directed the purchase of a cemetery lot, the removal thereto of his "father's family dead," and the purchase of monuments, and then provided for the setting apart by his executor of a fund to produce interest sufficient to provide for the care of the cemetery lots and graves, said sum to be held in trust in perpetuity, the residue of the estate to his executor in payment for services, it was held that the will was invalid as an unlawful suspension of the absolute ownership of personal property. *Matter of Dewitt*, (1906) 113 App. Div. 790, 99 N. Y. S. 415, affirmed without opinion (1907) 188 N. Y. 567, 89 N. E. 1108.

§ 115. Certain grants for charitable uses regulated. 1. Any person desiring, in his lifetime, to promote the public welfare by founding, endowing and having maintained a public library, museum or other educational institutions, or a chapel and crematory, within this state, may to that end and for such purposes by

grant, in writing, convey to a trustee, or any number of trustees, named in such grant, and to their successors, any real property, belonging to such person, and situated or being within this state.

2. The person making such grant may therein designate:

(1) The nature, object and purposes of the institution to be founded, endowed and maintained.

(2) The name by which it shall be known.

(3) The powers and duties of the trustee or trustees and the manner in which he or they shall account, and to whom, if accounting be required; but such powers and duties shall not be held to be exclusive of other powers which may be necessary to enable such trustee or trustees to fully carry out the object of such grant.

(4) The mode and manner, and by whom, the successors to the trustee or trustees named in the grant are to be appointed.

(5) Such rules and regulations for the management of the property conveyed as the grantor may elect to prescribe; but such rules shall, unless the grantor otherwise prescribe, be deemed advisory only, and shall not preclude such trustee or trustees from making such changes as new conditions may from time to time require.

(6) The place or places where, and the time when, the building or buildings necessary and proper for the institution shall be erected, and the character and extent thereof. The person making such grant may therein provide for all other things necessary and proper to carry out the purposes thereof, and especially may such person provide for such lectures, exhibitions, instruction or amusement in connection with such institution as he may deem desirable.

3. The trustee or trustees named in such grant and their successors, may in the name of the institution, as designated in such grant, sue and defend, in relation to the trust property and in relation to all matters affecting the institution endowed and established by such grant.

4. The person making such grant, by a provision therein, may elect, in relation to the property conveyed and in relation to the erection, maintenance and management of such institution, to perform, during his life, all the duties and exercise all the powers which, by the terms of the grant, are enjoined upon and vested in the trustee or trustees therein named. If the person making such grant, and making the election aforesaid, be a married person, such person may further provide that if the wife of such person survive him, then such wife, during her life, may, in relation to the property conveyed, and in relation to the erection, maintenance and management of such institution, perform all the duties and exercise all the powers, which, by the terms of the grant, are enjoined upon and vested in the trustee or trustees therein named, and in all such cases the powers and duties conferred and imposed by such grant upon the trustee or trustees therein named, shall be exercised and performed by the person making such grant, or by his wife during his or her life, as the case may be; provided, how-

ever, that upon the death of such person, or his surviving wife, as the case may be, such powers and duties shall devolve upon and shall be exercised by the trustee or trustees named in the grant and their successors.

5. The person making such grant may therein reserve the right to alter, amend or modify the terms and conditions thereof and the trusts therein created, in respect to any of the matters mentioned or referred to in paragraphs numbered one to six inclusive of subdivision two hereof; and may also therein reserve the right, during the life of such person, of absolute dominion over the rents, issues and profits of the real property conveyed, without liability to account therefor in any manner whatever, and without any liability over against the estate of such person; and if any such person be married, such person may, in said grant, further provide that if his wife survive him, then such wife, during her life, may have the same dominion over such rents, issues and profits, without liability to account therefor in any manner whatever, and without liability over against the estate of either of the spouses.

6. Any such grant may be executed, acknowledged and recorded in the same manner as is now provided by law for the execution, acknowledging and recording of grants of real property.

7. No suit, action or proceeding shall be commenced or maintained by any person to set aside, annul or affect said conveyance, or to affect the title to the property conveyed, or the right to the possession, or to the rents, issues and profits thereof, unless the same be commenced within two years after the date of filing such grant for record; nor shall any defense be made to any suit, action or proceeding commenced by the trustee or trustees named in said grant or their successors, privies or persons holding under them, which defense involves the legality of said grant, or affects the title to the property thereby conveyed, or the right to the possession or the rents, issues and profits thereof, unless such defense is made in a suit, action or proceeding commenced within two years after such grant shall have been filed for record.

This section was derived from L. 1892, ch. 516, §§ 1-7. Section 1 as amended by L. 1905, ch. 393, § 1.

Section 115 of the Real Property Law of 1896 is now covered by section 135.

Regulation of certain gifts for charitable and educational uses: see PERSONAL PROPERTY LAW, § 14.

Limitation on devise or bequest to certain societies, associations and corporations: see DECEDENT ESTATE LAW, § 17.

§ 116. Executors', fiduciaries' and trustees' investments in certain stocks regulated. Whenever an executor, trustee, guardian of an infant, committee of a lunatic, or other person or persons acting in a fiduciary capacity, or a life tenant, is entitled to receive the proceeds of the sale of any real property sold or to be

sold pursuant to the provisions of this article, or pursuant to a judgment in partition, or pursuant to a power of sale contained in a deed or will, and the said property has been or is about to be purchased by a corporation formed or to be formed for such purpose, and all adult beneficiaries and also all adult persons having a vested interest or estate in possession, reversion or remainder in the proceeds of such sale have agreed, or desire to agree that their share of such proceeds shall be invested in the stock and bonds or in either the stock or bonds of such corporation, then the said executor, trustee, guardian, committee or other person or persons acting in a fiduciary capacity, or the life tenant or tenants, may, with the approval of the supreme court, invest his share of the proceeds of such sale in the stock or bonds of such corporation, provided, however, that such corporation shall be prohibited by its certificate of incorporation from investing in any stocks, bonds or other securities other than real estate which are not under the laws of this state a proper subject for the investment of trust funds. The supreme court shall not grant an order permitting such an investment, unless it appears to the satisfaction of such court that a written notice stating the time and place of the application for such leave has been served upon every beneficiary and also upon every person in being having a vested interest or estate in possession, reversion or remainder, in such proceeds at least eight days before the making thereof, if such beneficiary or other person is an adult within the state; or if a minor, lunatic, person of unsound mind, habitual drunkard or absentee, until proof of the service on such beneficiary or other person of such notice as the court or a justice thereof prescribes. The court shall appoint a special guardian for any minor and for any lunatic, person of unsound mind, or habitual drunkard, who shall not be represented by a committee duly appointed. The application must be by petition duly verified, must be made by the executor, trustee, guardian of an infant, committee of a lunatic, or such other person or persons acting in a fiduciary capacity, or a life tenant, entitled to receive the proceeds of such sale, and shall set forth the reasons for such investment and the nature thereof and the peculiar facts which make it proper that the application shall be granted. After taking proof of the facts either before the court or a referee, and hearing the parties and fully examining into the matter, the court must make a final order upon the application. In case the application is granted, the final order must authorize the said executor, trustee, guardian of an infant, committee of a lunatic, or other person or persons acting in a fiduciary capacity, or life tenant, so entitled to receive the proceeds of such sale, to make such investment upon such terms and conditions as the court may therein prescribe.

This section was derived from Real Property Law of 1896, § 94, as added by L. 1901, ch. 166, § 1, and amended by L. 1904, ch. 742, § 1. The report

of the Board of Statutory Consolidation (1907) has a note relating to this, and other sections, and which appears in the note to section 67, *supra*.

Section 116 of the Real Property Law of 1896 is now covered by section 136.

Investment of trust funds: see PERSONAL PROPERTY LAW, § 21.

Investment of trust funds by executor, administrator or trustee: see DECEDENT ESTATE LAW, § 111.

Appointment of guardian generally: see Code Civ. Pro., § 2642 et seq.

Investment for infant.—Under the section an application by the guardian of infants as tenants in common of certain real property, for leave to convey the infants' interest, in conjunction with all other owners, to a corporation formed for the purpose of holding the property, and to issue shares of stock of such corporation to the guardian for and on behalf of the infants, will be denied in the exercise of judicial discretion, as the section vests the court with entire discretion in the matter. *Matter of Evans*, (1913) 82 Misc. 193, 143 N. Y. S. 839.

Effect of investing trust securities in name of trust company.—The effect of investing trust securities in the name of a trust company and in its own right is the same as if the trust company took the trust fund as a deposit, leaving its investment and the account relating thereto wholly to its book-keeping and the form adopted by it for keeping its accounts. Such holding of a trust fund does not outwardly distinguish the funds held by it as trustee from the funds of individual depositors with the trust company. Such manner of investing a trust fund violates the long-established rule that a trustee should invest trust funds in the name of the trustee as such, and also the rule that trust funds should at all times be kept, so far as reasonably possible, in the name of the trust, so that they can be identified, distinguished and followed by all persons interested therein. *Matter of Union Trust Co.*, (1916) 219 N. Y. 514, 114 N. E. 1057, affirming 170 App. Div. 953, 155 N. Y. S. 1145.

Liability of executor.—If an executor disregards the provisions of the will or a rule of law relating to investments, he takes the risk of any loss that may result, without the right to any profit that he may make by reason of such investment, and it is optional with beneficiaries of the estate to hold the personal representative liable for the amount of funds that he has invested improperly or to accept the investment as made. *Villard v. Villard*, (1916) 219 N. Y. 482, 114 N. E. 789, affirming 166 App. Div. 203, 151 N. Y. S. 1027. See also *Adair v. Brunner*, (1878) 74 N. Y. 539.

§ 117. Commissions of trustees. Any trustee, under a deed of trust to sell real property for the benefit of creditors, shall be entitled to and allowed upon an accounting hereafter had, the same commissions as an assignee for the benefit of creditors.

This section was derived from L. 1896, ch. 249, § 1.

Section 117 of the Real Property Law of 1896 is now covered by section 137.

Trustee's commissions generally: see Code Civ. Pro., § 330.

Commissions of trustee under deed of trust to sell personal property for benefit of creditors: see PERSONAL PROPERTY LAW, § 22.

Commissions of assignee: see DEBTOR AND CREDITOR LAW, § 21.

Right to compensation in absence of statute or contract: see Ann. Cas. 1913C 195 note.

Waiver of right to compensation: see Ann. Cas. 1914B 493 note.

Generally.—It has been held that just and reasonable compensation for the services of assignees means the commissions allowed by law to executors, and that such commissions are the reasonable compensation in all cases. *Matter of Shaw*, (1879) 18 Hun 195. See also *Ogden v. Murray*, (1868) 39 N. Y. 202; *Jacobs v. Remsen*, (1867) 36 N. Y. 668; *Duffy v. Duncan*, (1866) 35 N. Y. 187, affirming 32 Barb. 587; *Matter of Moffat*, (1881) 24 Hun 325.

Commissions of assignee.—Where, after an assignment for the benefit of creditors, and after a sale and collection of a portion of the goods and accounts assigned, the assignors compromised with their creditors, who

executed a composition deed, it was held that, as it appeared that commissions on the moneys which were actually received by the assignee would be a fair and reasonable compensation for the services rendered, he was only entitled thereto, not to commissions upon the value of all the assigned property. In *Matter of Hulburt*, (1882) 89 N. Y. 259. And the necessity for and the reasonableness of an assignee's expenses must be shown upon his accounting. *Matter of Manahan*, (1879) 10 Daly 39.

Commissions where assignment is set aside.—It is not usual or customary to allow to an assignee, under an assignment held void and set aside for fraud, commissions and expense for the management and disposition of property to which the court has held that he had no title, and those who are interested in the estate and entitled to share therein as creditors clearly ought to have opportunity to be heard upon such an accounting. *Matter of Thoesen*, (1901) 62 App. Div. 87, 70 N. Y. S. 924. In *Dexter v. Adler*, (1888) 1 N. Y. S. 684, it was held that no commissions are allowable to an assignee where the assignment is set aside for fraud, whether participated in by assignee or not. See also *Dorney v. Thacher*, (1894) 76 Hun 361, 27 N. Y. S. 787, 58 N. Y. St. Rep. 466.

Commissions to same person as executor and trustee.—The same person may be entitled to compensation as executor and also as trustee, in respect to the same estate, or some part thereof, but this does not follow in every instance where trust duties are imposed upon an executor. Where, by the terms or true construction of the will, the two functions with their corresponding duties co-exist, and run from the death of the testator to the final discharge, interwoven, inseparable and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function would end and the other begin, double commissions or compensation in both capacities cannot properly be allowed. *Matter of Ziegler*, (1916) 218 N. Y. 544, 113 N. E. 553, affirming 168 App. Div. 735, 154 N. Y. S. 735.

Commissions of substituted trustee.—The amount of commission allowed to testamentary trustees is governed by the law in force at the time of the settlement of their accounts, and where a substituted trustee of a testamentary trust dies before the trust is fully executed his estate is not entitled to half commissions on the whole corpus of the trust fund received by him, but only to commissions at half the statutory rate upon the cash received by him upon taking over the trust fund and half commissions upon the moneys which he received during his administration of the estate by the liquidation of securities constituting part of the fund received, and which he was bound to reinvest. A substituted trustee who is appointed to succeed a deceased trustee, and who fully executes the trust, is entitled not only to the commissions specified above, but also to a commission of one-half the statutory rate on the total fund which he has to distribute in cash or securities: that the fund is to be turned over to other testamentary trustees under the same will of whom the accounting trustee is one is immaterial. *Whitehead v. Draper*, (1909) 132 App. Div. 799, 117 N. Y. S. 539. See also *Matter of Todd*, (1901) 64 App. Div. 435, 72 N. Y. S. 277. And a substituted trustee is entitled to one-half commission for receiving property from his predecessor. *Matter of Baldwin*, (1913) 209 N. Y. 601, 103 N. E. 734, affirming 157 App. Div. 897, 142 N. Y. S. 1107; *In re Naylor's Estate*, (1917) 164 N. Y. S. 462.

Commission of representatives of deceased executor.—The representatives of a deceased executor are not entitled to commissions for paying out, when the executor died before any payments were actually made by him. *Matter of Ziegler*, (1916) 18 N. Y. 544, 113 N. E. 553, affirming 168 App. Div. 735, 154 N. Y. S. 735; *In re Naylor's Estate*, (1917) 164 N. Y. S. 462.

ARTICLE 5*

POWERS

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* This article was article 4 of the Real Property Law of 1896.

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§ 130. Effect of article. Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, are abolished. Hereafter the creation, construction and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney to convey real property in the name and for the benefit of the owner.

This section was derived from Real Property Law of 1896, § 110. The report of the Board of Statutory Consolidation (1907), page 4902, has the following note relating to this section: "The Revised Statutes abolished powers as then existing (1 R. S. 732, § 73). The Real Property Law repealed 1 R. S. 732, § 73. There was then no law abrogating the old law of powers, so that the language of former § 110 is equivocal. Section 110 should now be re-enacted in the language of the Revised Statutes, so as to cure this defect by making the abolition of the old law of powers positive and express, instead of by implication."

Section 130 of the Real Property Law of 1896 is now covered by section 150.

Recording powers of attorney and revocation thereof: see *infra*, §§ 294, 326.

Scope and meaning.—In *Cutting v. Cutting*, (1881) 86 N. Y. 522, the corresponding section of the Revised Statutes was declared to mean that in construing powers the courts must look to the provisions of the article on powers to ascertain the effect in law which the creation and execution of a power has upon the property subject to it. See also *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092; *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342; *Jennings v. Conboy*, (1878) 73 N. Y. 230. And in *Hutton v. Benkard*, (1883) 92 N. Y. 295, it was held that the former section of the Revised Statutes was broad enough to include all powers, both as to real and personal property, and that the rules for the creation, construction and execution of powers as to real estate should be applied, so far as possible, to personal estates. See also *Matter of Moehring*, (1897) 154 N. Y. 423, 48 N. E. 818, affirming 19 App. Div. 629, 46 N. Y. S. 1097.

Purpose of creation of powers.—"Powers may be created for any lawful purpose, by any language which indicates an intention to bestow them, and to do any act which the grantor might himself lawfully perform." Reynolds

v. Denslow, (1894) 80 Hun 359, 30 N. Y. S. 77. See also Cahill v. Russell, (1893) 140 N. Y. 402, 35 N. E. 664.

Persons to whom applicable.—Under this section, a power may be granted by any owner having *jus disponendi*, but it may be vested in those only who are capable in law of holding property. Matter of Mayo, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

Cited.—This section was cited in Tilden v. Green, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33; Sweeney v. Warren, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468; Ilirsh v. Bucki, (1914) 162 App. Div. 659, 148 N. Y. S. 214; Matter of Wilkin, (1904) 90 App. Div. 324, 86 N. Y. S. 360; Stanley v. Payne, (1909) 65 Misc. 77, 119 N. Y. S. 570; Matter of New York Life Ins., etc., Co., (1913) 139 N. Y. S. 695.

§ 131. Definition of a power. A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.

This section was derived from Real Property Law of 1896, § 111.

Section 131 of the Real Property Law of 1896 is now covered by section 151.

Certain devices to be deemed powers: see supra, § 97.

When authorized trust valid as a power: see supra, § 99.

Admissibility of parol evidence to show intent of testator to create power of appointment: See Ann. Cas. 1915B 52 note.

Nonexclusive powers and illusory appointments: see L. R. A. 1916D 498.

General scope of power.—The statute does not enumerate or define the acts which may be done under a power, as in the case of trusts, and they are practically unlimited. They may be created for any lawful purpose by any language which indicates an intention to bestow them, and to do any act which the grantor might himself lawfully perform. Reynolds v. Denslow, (1894) 80 Hun 359, 30 N. Y. S. 77; Ludlow v. Van Ness, (1861) 8 Bosw. 178. And the statutory definition of a power as applied to real estate includes an authority to create or revoke an estate therein. Chanler v. Kelsey, (1907) 205 U. S. 466, 27 S. Ct. 550, 51 U. S. (L. ed.) 882, affirming Matter of Delano, (1903) 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279, which reversed 82 App. Div. 147, 81 N. Y. S. 762. But, while a power as defined by the section is a right to dispose of the legal estate, it does not confer on the grantee, as such, an estate. Stanley v. Payne, (1909) 65 Misc. 77, 119 N. Y. S. 570.

Power as an estate in lands.—A power is not an estate or interest in lands; unexercised, it is an incumbrance; and when exercised, the act performed by virtue of it is considered and construed as done by the donor of the power. Eells v. Lynch, (1861) 8 Bosw. 465. And, although a power is not an estate or interest in the land, it is an authority to create an estate or interest. Thus a power may be given to a person who has an estate in the land, or to a mere stranger. Root v. Stuyvesant, (1837) 18 Wend. 257.

Objects to be benefited.—“To create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created.” Sweeney v. Warren, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468. See also Henly v. Fitzgerald, (1873) 65 Barb. 508. But no form of words is requisite to create a power. Hubbard v. Gilbert, (1881) 25 Hun 596.

Powers to create future estates.—In Towler v. Towler, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342, it was held, under the Revised Statutes, that where by a deed a grantor reserved a power to create a future estate in the land conveyed, the power, unless coupled with a trust, was not imperative, but its execution depended entirely upon the will of the grantor, and that it was doubtful whether it came within the definition of a power as set forth by the statute. See also Eells v. Lynch, (1861) 8 Bosw. 465.

Power to lease lands.—A power to lease lands for the purpose of paying charges thereon is within the definition of the section. *Matter of England*, (1910) 69 Misc. 523, 127 N. Y. S. 881.

Application to personal property.—The provisions of the article relating to powers apply also to powers relating to personal property. *Matter of Cooksey*, (1905) 182 N. Y. 92, 74 N. E. 880, affirming 100 App. Div. 516, 91 N. Y. S. 1091; *Matter of Moehring*, (1897) 154 N. Y. 423, 48 N. E. 818, affirming 19 App. Div. 629, 46 N. Y. S. 1097; *Matter of Wilkin*, (1904) 90 App. Div. 324, 86 N. Y. S. 360; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906; *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

Cited.—This section was cited in *Jennings v. Conboy*, (1878) 73 N. Y. 230; *Tucker v. Tucker*, (1851) 5 N. Y. 408; *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Shuler v. Shuler*, (1909) 63 Misc. 604, 118 N. Y. S. 629, reversed 137 App. Div. 515; *Leonard v. American Baptist Home Mission Soc.*, (1885) 35 Hun 290; *Dempsey v. Tylee*, (1854) 3 Duer 73; *Fellows v. Heermans*, (1870) 4 Lans. 230; *Hotchkiss v. Elting*, (1861) 36 Barb. 38.

§ 132. Definitions of grantor, grantee. The word “grantor” is used in this article, in connection with a power, as designating the person by whom the power is created, whether by grant or by devise; and the word “grantee” is so used as designating the person in whom the power is vested, whether by grant, devise or reservation.

This section was derived from Real Property Law of 1896, § 112.

Section 132 of the Real Property Law of 1896 is now covered by section 152.

Application to executors.—Executors who are vested with trust powers may be termed grantees thereof. *Van Boskerck v. Herrick*, (1873) 65 Barb. 250.

Cited.—This section was cited in *Barber v. Cary*, (1854) 11 N. Y. 397; *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

§ 133. Division of powers. A power, as authorized in this article, is either general or special, and either beneficial or in trust.

This section was derived from Real Property Law of 1896, § 113.

Section 133 of the Real Property Law of 1896 is now covered by section 153.

Certain devises to be deemed powers: see *supra*, § 97.

Application to personal property.—Powers connected with personal property are now for all practical purposes coextensive with powers in the law of real property, and they are governed by the same rules. *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

Cited.—This section was cited in *Weinstein v. Weber*, (1901) 58 App. Div. 112, 68 N. Y. S. 570.

§ 134. General power. A power is general, where it authorizes the transfer or incumbrance of a fee, by either a conveyance or a will of, or a charge on, the property embraced in the power, to any grantee whatever.

This section was derived from Real Property Law of 1896, § 114.

Section 134 of the Real Property Law of 1896 is now covered by section 154.

General power in trust: see *infra*, § 137.

Certain powers create a fee: see *infra*, § 150.

Application to personal property.—The provisions of the section include and are applicable as well to powers concerning personality as to those affect-

ing real estate. *Matter of Moehring*, (1897) 154 N. Y. 423, 48 N. E. 818, affirming 19 App. Div. 629, 46 N. Y. S. 1097; *Cook v. Lowry*, (1884) 95 N. Y. 103; *Hutton v. Benkard*, (1883) 92 N. Y. 295; *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906; *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

Power of disposition.—The power of disposition is equivalent to actual ownership. *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175. And a general and beneficial power to devise, given to a tenant for life, is an absolute power of disposition equally with the power to sell and convey. *Hayes v. Gunning*, (1906) 51 Misc. 517, 101 N. Y. S. 875.

Cited.—This section was cited in *Coleman v. Beach*, (1885) 97 N. Y. 545; *Leonard v. American Baptist Home Mission Soc.*, (1885) 35 Hun 290.

§ 135. Special power. A power is special where either:

1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated; or,
2. The power authorizes the transfer or incumbrance, by a conveyance, will or charge, of any estate less than a fee.

This section was derived from Real Property Law of 1896, § 115.

Section 135 of the Real Property Law of 1896 is now covered by section 155.

Special power in trust: see *infra*, § 138.

Capacity to take a special power: see *infra*, § 143.

Separation of powers.—If all technical powers are conferred on a donee, he takes a fee simple in respect of real property, and the absolute dominion if the power concerns personalty. If the powers are separated, the interest of the donee may be less than a fee; or it may, if not beneficial, be merely a delegated authority in the nature of a trust. *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

Power based upon contingency.—A power is special where a class of persons to whom the disposition of lands under the power is to be made is designated contingently, upon the happening of a certain event, as well as if a class or person is designated absolutely. *Wright v. Tallmadge*, (1857) 15 N. Y. 307.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Mortimer*, (1916) 219 N. Y. 290, 114 N. E. 389, affirming 157 App. Div. 915, 142 N. Y. S. 1117; *Kemp v. Kemp*, (1901) 36 Misc. 79, 72 N. Y. S. 617.

§ 136. Beneficial power. A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

This section was derived from Real Property Law of 1896, § 116.

Section 136 of the Real Property Law of 1896 is now covered by section 156.

Capacity to take beneficial power: see *infra*, § 143.

Power of sale in trust deed or mortgage as power coupled with interest: see 4 Ann. Cas. 58 notes.

When power of sale deemed coupled with an interest: see 50 L. R. A. (N. S.) 632 note.

Test as to whether power is beneficial.—A power is not beneficial when any person other than the grantor has, by the terms of its creation, any pecuniary interest in the land or in the execution of the power. *Wright v. Tallmadge*, (1857) 15 N. Y. 307; *Syracuse Sav. Bank v. Porter*, (1885) 36 Hun 168, affirmed (1887) 105 N. Y. 415, 11 N. E. 950. See also *Swaney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575; *Crooke v. Kings County*, (1884) 97 N. Y. 421; *Coleman v. Beach*, (1885) 97 N. Y. 545; *Hetzel v. Barber*, (1877) 69 N. Y. 1, reversing in part 6 Hun 534; *Rose v. Hatch*, (1890) 55 Hun 457, 8 N. Y. S. 720,

affirmed (1891) 125 N. Y. 427, 26 N. E. 467; *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175. Thus where a will conferred upon an executrix the power to settle "and carry out all the provisions of the will that are or shall be necessary to be done or performed during her life," and one of the provisions which might become necessary to carry out during her life was to sell the real estate or so much thereof as may be necessary to supply her wants, it was held that a power of sale was given to her as executrix, and that this power was a general power within the provisions of the statute, and the executrix, being also the widow of the testator, was the person for whose benefit the power was created, and it therefore became a general and beneficial power. *Leonard v. American Baptist Home Mission Soc.*, (1885) 35 Hun 290. And where a grantee of an estate for life took also a power to alien in fee to any person by will, and no person other than the grantee of the power had by the terms of its creation any interest in its execution, it was held that the power was a general beneficial one, and that the grantees of the life estate, with such a power, could convey in fee by deed, although the instrument creating the life estate and the power attempted to restrain and prohibit any conveyance by deed. *Hume v. Randall*, (1894) 141 N. Y. 499, 36 N. E. 402, reversing 65 Hun 437, 20 N. Y. S. 352. See also *Deegan v. Wade*, (1895) 144 N. Y. 573, 39 N. E. 692, affirming 75 Hun 39, 26 N. Y. S. 989.

Power silent as to person to be benefited.—A power is beneficial when it is silent as to the person to be benefited by its execution. *Sweeney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575; *Jennings v. Conboy*, (1878) 73 N. Y. 230, reversing 10 Hun 77.

Designation of object to be accomplished.—In order to create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be accomplished by its execution shall be specified in or clearly ascertainable from the instrument by which the power is attempted to be created; and when a power is conferred upon executors by virtue of the office, and not upon them as individuals, in the absence of evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate and not for their own benefit. *Sweeney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575.

Beneficial power as property.—A beneficial power is property, or a tangible res. *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066. Thus where absolute power of disposition is given to executors, and if no other person has any interest in its execution, and it be construed as unaccompanied by any trust, it is a beneficial power in them and they take an absolute fee. *Kinnier v. Rogers*, (1870) 42 N. Y. 531. But the law does not tolerate the holding of the title to lands by persons not beneficially interested therein, except upon some valid trust properly manifested. *Hubbard v. Gilbert*, (1881) 25 Hun 596.

Application to personal property.—The same rule laid down by the section applies to a bequest of a power affecting personal property as to one affecting real estate. *Matter of Perkins*, (1910) 68 Misc. 255, 124 N. Y. S. 998.

Power to devise as beneficial power.—A power to devise only may be general and at the same time beneficial, and as it cannot be a general power, without giving authority to alien in fee, to any alienee whatever, it follows that a power to devise to any one whomsoever, when it is not a power in trust, is a beneficial power. *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360. And where a power of disposition was given on condition that it should not be exercised without the approval of the testator's heirs surviving when the sale was made, and the object of the power was to enable the widow, with the consent of the children, to convert the real estate into money, so as to give her the income for her support instead of the rents and profits of the land, it was held that the power was not a beneficial one within the definition of the statute. *Ackerman v. Gorton*, (1876) 67 N. Y. 63, reversing 6 Hun 301.

Devise of residuary estate "to be distributed by executor."—Where a testator gave his residuary estate "to be distributed by executor in his discretion or as may be hereafter mentioned in codicils or written additions to this will" and died without having made any codicils or written additions to his will, it was held that the executor named in the will took an absolute, general and beneficial power of disposition with respect to the residuary

estate which vested him with the absolute title thereto, although he renounced as executor, and letters of administration were issued to another. *Hill v. Fiske*, (1910) 69 Misc. 507, 125 N. Y. S. 1026.

Power of appointment.—When a will gave certain real and personal estate to the executor, in trust, to take the rents and profits during the life of the testator's son and apply them to his use, and upon his decease to make over the body of the estate to whomever he by his will appointed to receive it, and he made an appointment as therein prescribed, it was held that the will created a valid general and beneficial power, and that the estate was not chargeable after the death of the son with a judgment obtained against him in his lifetime. *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Mortimer*, (1916) 219 N. Y. 290, 114 N. E. 389, affirming 157 App. Div. 915, 142 N. Y. S. 1117; *Weinstein v. Weber*, (1901) 58 App. Div. 112, 68 N. Y. S. 570; *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175; *American Bible Soc. v. Stark*, (1873) 45 How. Pr. 160.

§ 137. General power in trust. A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

This section was derived from Real Property Law of 1896, § 117.

Section 137 of the Real Property Law of 1896 is now covered by section 157.

Essential nature of power in trust.—A power in trust, in its essential nature, places upon the grantee thereof a duty to execute it in favor of some person or persons other than himself. It involves a form of express fiduciary obligation similar to that of an express trust, and it therein differs from a mere agency, revocable at pleasure, which imposes no duty, but merely grants an authority to act. *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570. See also *Farmers' Loan, etc., Co. v. Carroll*, (1849) 5 Barb. 613. And a general power in trust is never to be exercised for the benefit of the donee of the power. He must exercise it for the sole benefit of the beneficiaries of the power, and when for any reason this is impossible it cannot be exercised. *Garvey v. McDevitt*, (1878) 72 N. Y. 556, affirming 11 Hun 457. See also *Hetzel v. Barber*, (1877) 69 N. Y. 1, reversing in part 6 Hun 534. But when the power is given for other purposes and other persons are benefited by its execution, the fact that the donee of the power may also derive a benefit will not deprive him of the right to its execution. *Doscher v. Wyckoff*, (1909) 132 App. Div. 139, 116 N. Y. S. 389, affirming 63 Misc. 414, 113 N. Y. S. 635. See also *Gardner v. Dembinsky*, (1900) 52 App. Div. 473, 65 N. Y. S. 183, affirmed without opinion (1902) 170 N. Y. 593, 63 N. E. 1117.

Power as an estate in land.—A power is not an estate or interest in land, but an authority to create an estate or interest. Thus a power may be given to a person who has an interest in the land, or to a mere stranger. *Root v. Stuyvesant*, (1837) 18 Wend. 257.

Unsuccessful express trust as power in trust.—An unsuccessful attempt to create an express trust for a purpose specified in section 96, *infra*, does not create a power in trust. *Murray v. Miller*, (1904) 178 N. Y. 316, 70 N. E. 870, affirming 85 App. Div. 414, 83 N. Y. S. 591; *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570. See also *Shuler v. Shuler*, (1909) 63 Misc. 604, 118 N. Y. S. 629, reversed on other grounds 137 App. Div. 515. And where a trust declared is not one recognized by statute the title remains in the grantor, subject to the execution of the trust as a power. *New York Dry Dock Co. v. Stillman*, (1864) 30 N. Y. 174. See also *Clapp v. Byrnes*, (1896) 3 App. Div. 284, 38 N. Y. S. 1063, affirmed (1898) 155 N. Y. 535, 50 N. E. 277.

Coexistence of trust and power in trust.—A trust and a power in trust, in a proper case, may exist together, where they are not inconsistent. The same person may hold the estate in trust for one purpose, and at the same time be a grantee of a power in trust, to be executed or take effect at some future day, for another. *Belmont v. O'Brien*, (1855) 12 N. Y. 394.

Creation of perpetuity by power in trust.—A perpetuity cannot be created by means of a power in trust any more than by a direct limitation. *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238.

Power to lease lands for purpose of paying charges thereon.—A power to lease lands for the purpose of paying charges thereon is a general power in trust, where persons other than the grantee of the power are designated as entitled to the proceeds or other benefits to result from its execution. *Matter of England*, (1910) 69 Misc. 523, 127 N. Y. S. 881.

Power of sale.—A power given to an executor to sell real estate as he "shall deem expedient and for the best interest" of certain legatees is a general power in trust in which the executor has no interest. *Russell v. Russell*, (1867) 36 N. Y. 581, 93 Am. Dec. 540.

Where a deed, purporting to be an instrument between E., of the first part, and C., in trust for three infant children of C., "with power to sell and convey or mortgage without the appointment of a guardian, of the second part," conveyed certain premises to the party, "their heirs and assigns, forever," and with no other reference to a trust or power save that contained in the first clause, it was held that the three infants were the real beneficiaries of the grant and that the land passed to and vested in them, subject to the execution of the power, which was a general trust power to be executed solely for their benefit. *Syracuse Sav. Bank v. Holden*, (1887) 105 N. Y. 415, 11 N. E. 950, affirming 36 Hun 168. And in *Kimier v. Rogers*, (1870) 42 N. Y. 531, the testator, after directing payment of his debts and making certain bequests, gave all the rest, residue and remainder of his estate, both real and personal, "to his children," and authorized his executors to sell any part of his real estate at any time and in their discretion, and to execute valid deeds for the same to purchasers, it was held that he thereby invested his executors with a power in trust to convert the land into personal estate for convenience of distribution and thus avoid the expenses or delay of partition or other legal proceedings, and that the executors could convey good title. See also *Mutual Life Ins. Co. v. Shipman*, (1888) 108 N. Y. 19, 15 N. E. 58.

Where a testator gave his wife one-third of all his estate and divided the residue among his eight children and one grandson, and provided that their shares should be paid to them within one year after the youngest child should become of age, five of whom were minors at the time of testator's death, and the will gave to the executrix a discretionary power of sale, with the direction that it should not be exercised until the majority of his youngest child, the widow qualified, and, after having acted as executrix and trustee under the will for several years, died, it was held that the power in trust was void, and that an application for the appointment of a new trustee was properly denied. *Matter of Butterfield*, (1892) 133 N. Y. 473, 31 N. E. 515, affirming *Matter of Christie*, (1891) 59 Hun 153, 13 N. Y. S. 202.

Cited.—This section was cited in *Sweeney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575; *Leggett v. Perkins*, (1849) 2 N. Y. 297; *Weinstein v. Weber*, (1901) 58 App. Div. 112, 68 N. Y. S. 570; *Mellen v. Banning*, (1893) 72 Hun 176, 25 N. Y. S. 542; *Lathrop v. Lathrop*, (1892) 63 Hun 635 mem., 18 N. Y. S. 651; *Fellows v. Heermans*, (1870) 4 Lans. 230.

§ 138. Special power in trust. A special power is in trust, where either,

1. The disposition or charge which it authorizes is limited to to be made to a person or class of persons, other than the grantee of the power; or,

2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

This section was derived from Real Property Law of 1896, § 118.

Section 138 of the Real Property Law of 1896 is now covered by section 158.

Essentiality of power in trust.—An express trust in lands cannot exist except for the purposes specified in the statute of uses and trusts; and where a trust estate is attempted to be created for a purpose not enumerated in the statute, no estate whatever vests in the trustees, and it is indispensable to the creation of a trust or a power in trust, that authority to perform the required act should be delegated to the trustee by the owner of the estate or one having authority to dispose of it or of some interest therein. *Selden v. Vermilya*, (1850) 3 N. Y. 525, reversing 2 Sandf. 568.

Necessity of beneficiary.—In all cases of a power in trust, an appointee or beneficiary other than the grantee of the power is contemplated, and it is as necessary an ingredient in the case of a power in trust as a *cestui quo trust* is in the case of a conveyance or devise in trust. *Farmers' Loan, etc., Co. v. Carroll*, (1849) 5 Barb. 613.

Power of appointment.—A power of appointment may be a special power in trust. *Kemp v. Kemp*, (1901) 36 Misc. 79, 72 N. Y. S. 617.

Cited.—This section was cited in *Smith v. Bowen*, (1866) 35 N. Y. 83.

§ 139. Capacity to grant a power. A person is not capable of granting a power, who is not, at the same time, capable of transferring an interest in the property to which the power relates.

This section was derived from Real Property Law of 1896, § 119.

Section 139 of the Real Property Law of 1896 is now covered by section 159.

Capacity to transfer real property: see *supra*, § 11.

How power must be executed: see *infra*, § 165.

Powers of appointment.—As a term of description, "powers of appointment" continued in use after the abolition of all common-law powers by the Revised Statutes, and they now have again an official recognition, although the classification is inconsistent with the former Revised Statutes. *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066. See also *Kemp v. Kemp*, (1901) 36 Misc. 79, 72 N. Y. S. 617.

Cited.—This section was cited in *Dempsey v. Tylee*, (1854) 3 Duer 73.

§ 140. How power may be granted. A power may be granted either:

1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates;
2. By a devise contained in a will.

This section was derived from Real Property Law of 1896, § 120.

Section 140 of the Real Property Law of 1896 is now covered by section 160.

How power must be executed: see *infra*, § 165.

Words necessary to create a power.—No formal set of words is necessary to create a power, as it is sufficient if the intention to create it clearly appears, and instruments should be construed liberally, in furtherance of that intention. *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175. See also *Russell v. Russell*, (1867) 36 N. Y. 581, 93 Am. Dec. 540; *Hubbard v. Gilbert*, (1881) 25 Hun 596; *Selden v. Vermilya*, (1849) 2 Sandf. 568. Nor does the statute attempt to enumerate or define the lawful occasion for creating a power. *Downing v. Marshall*, (1861) 23 N. Y. 366, 80 Am. Dec. 290. And a power created by deed must be more formal than one created by will. In the latter case, there may be a mere naked power, no estate in the land being given to any one. In the former case, the deed must convey, and be sufficient in form and manner of execution to convey, some estate in the land, and then a power relating to the same land may be granted. *Jennings v. Conboy*, (1878) 73 N. Y. 230, reversing 10 Hun 77. But the revocation of a devise by the substitution of an illegal trust or power is invalid and inoperative. *Tucker v. Tucker*, (1851) 5 N. Y. 408, affirming 5 Barb. 99.

Intention.—The intention is to govern, and if that intention is a legal one full effect is to be given to it. *Thomas v. Wolford*, (1888) 49 Hun 145,

1 N. Y. S. 610, 21 Abb. N. Cas. 231; *Fish v. Coster*, (1882) 28 Hun 64, affirmed without opinion (1883) 92 N. Y. 627; *Fellows v. Heermans*, (1870) 4 Lans. 230; *Dorland v. Dorland*, (1847) 2 Barb. 63.

Objects to be accomplished.—In order to create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be accomplished by its execution shall be specified in or clearly ascertainable from the instrument by which the power is attempted to be created. *Sweeney v. Warren*, (1891) 127 N. Y. 426, 28 N. E. 413, 24 A. S. R. 468, reversing 52 Hun 246, 6 N. Y. S. 575.

Power of disposition.—Where by the will of a testator his entire residuary estate was given to his widow for life with full power of disposal and without liability to account for either principal or interest, with remainder over, it was held that she took the estate for all purposes except that of testamentary disposition. *Matter of Post*, (1916) 96 Misc. 531, 160 N. Y. S. 684.

Application to personal property.—The provisions of the section apply equally to the creation of powers dealing with personal property. *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360.

Cited.—This section was cited in *Dempsey v. Tylee*, (1854) 3 Duer 73.

§ 141. Capacity to take and execute a power. A power may be vested in any person capable in law of holding, but can not be exercised by a person not capable of transferring real property.

This section was derived from Real Property Law of 1896, § 121.

Section 141 of the Real Property Law of 1896 is now covered by section 161.

Capacity to hold and transfer real property: see supra, §§ 10, 11.

How power must be executed: see infra, § 165.

Capacity to take under a power: see infra, § 179.

Limitation of section.—The only limitation upon the capacity to take and exercise the power is that the person shall be capable in law of holding and transferring real property. *Weeks v. Frankel*, (1910) 197 N. Y. 304, 90 N. E. 969, reversing 128 App. Div. 223, 112 N. Y. S. 562. See also *Wadhams v. American Home Missionary Soc.*, (1855) 12 N. Y. 415, reversing 10 Barb. 597; *Matter of Mayo*, (1912) 76 Misc. 416, 136 N. Y. S. 1066.

§ 142. Capacity of married woman to take power. A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee.

This section was derived from Real Property Law of 1896, § 122.

Section 142 of the Real Property Law of 1896 is now covered by section 162.

Powers of married women in respect to property: see DOMESTIC RELATIONS LAW, § 51.

Power of appointment in wife.—Where an estate was granted during the joint lives of a husband and wife, with power to the wife of appointing the fee either by deed or will, and if she died before her husband, without executing the power, the estate to go to her issue, to her heirs, she taking the absolute fee if she survived her husband, it was held that the wife had a general and beneficial power, within the provisions of the statute, of appointing the fee; that a master's sale under a decree in a partition suit would not destroy the contingent interests of her children, and that the only mode of conveying the estate freed from the interests of the children was by deed duly acknowledged, or by last will and testament. *Jackson v. Edwards*, (1839) 22 Wend. 498, affirming 7 Paige 386.

§ 143. Capacity to take a special and beneficial power. A special and beneficial power may be granted,

1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than

a fee, belonging to her, in the property to which the power relates ; or,

2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period but is void as to the excess.

This section was derived from Real Property Law of 1896, § 123.

Section 143 of the Real Property Law of 1896 is now covered by section 163.

Limit on leases of agricultural lands: see CONSTITUTION, art. 1, § 13.

Power to lease.—All those capable of alienating property may make leases which will endure as long as their interest in the thing leased, but no longer. *Matter of McCaffrey*, (1888) 50 Hun 371, 3 N. Y. S. 96. See also *Root v. Stuyvesant*, (1837) 18 Wend. 257. But a trustee holding a legal fee, determinable when the purposes of the trust shall cease, has power at law to lease for a term which may extend beyond the period of his trust estate, subject to the jurisdiction of a court of equity to annul the lease if unreasonable or improvident. *Greason v. Keteltas*, (1858) 17 N. Y. 491, affirming 19 Barb. 608.

§ 144. Reservation of a power. The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reserved shall be subject to the provisions of this article, in the same manner as if granted to another.

This section was derived from Real Property Law of 1896, § 124.

Section 144 of the Real Property Law of 1896 is now covered by section 164.

Reversion defined: see *supra*, § 39.

Trustee of express trust to have full estate: see *supra*, § 100.

Interest remaining in grantor of express trust: see *supra*, § 102.

Conveyances with power to revoke, determine or alter: see *infra*, § 267.

Construction of instrument creating a power.—An instrument creating a power, like all other instruments, must receive a reasonable construction, and the intention of the party executing the instrument is to be ascertained from the language used, the situation of the parties, and all the surrounding circumstances. *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342. And while section 173 requires that the consent of a necessary person to the execution of a power must be expressed in the instrument by which the power is executed, or in a written certificate thereon, executed and acknowledged in like manner as deeds are required to be executed, yet where the act of revocation as between the parties expresses a clear intention to revoke and the rights of third persons are in nowise affected and the trust instrument in itself does not provide in particular form how the revocation shall be executed, an instrument which clearly expresses the intention to revoke and is sufficient to accomplish such a purpose will be regarded as working such a result, even though it be not executed in the particular form required by the statute. *Schreyer v. Schreyer*, (1905) 101 App. Div. 456, 91 N. Y. S. 1065, affirmed without opinion (1905) 182 N. Y. 555, 75 N. E. 1134.

Effect of death of grantor.—Where no provision is made for the execution of a power in case of the death of the grantor, it is extinguished by his death. *Kissam v. Dierkes*, (1872) 49 N. Y. 602.

Reservation of power to create future estate.—Where by a deed the grantor reserves a power to create a future estate in the land conveyed the power, unless coupled with a trust, is not imperative, but its execution depends entirely upon the will of the grantor; it is only when a power is in trust that a court of equity will decree its execution. *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 42.

Cited.—This section was cited in *Genet v. Hunt*, (1889) 113 N. Y. 158, 21 N. E. 91.

§ 145. Effect of power to revoke. Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

This section was derived from Real Property Law of 1896, § 125.

Section 145 of the Real Property Law of 1896 is now covered by section 165.

Conveyances with power to revoke, determine or alter: see infra, § 267.

Power of revocation as property right.—An absolute power of revocation was always in equity as property of the donor, grantor, or the donee or grantee of the power; and where a deed of trust reserves to the donor an unqualified power of revocation, his dominion over the trust funds is not completely divested, and there is not a valid gift inter vivos thereof. *Matter of Hoyt*, (1914) 86 Misc. 696, 149 N. Y. S. 91.

Cited.—This section was cited in *Belmont v. O'Brien*, (1855) 12 N. Y. 394.

§ 146. Power to sell in a mortgage. Where a power to sell real property is given to a mortgagee, or to the grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

This section was derived from Real Property Law of 1896, § 126.

Section 146 of the Real Property Law of 1896 is now covered by section 166.

Construction of covenants in mortgages: see infra, § 254.

Execution of power to sell, mortgage or lease real estate by qualifying executors: see Code Civ. Pro., § 2694.

Execution of power to sell, mortgage or lease real estate by qualifying trustees or successors: see Code Civ. Pro., § 2696.

Right of mortgagee to pay taxes.—A mortgagee has the right to pay taxes upon the mortgaged property in order to preserve his lien. *Weed v. Hornby*, (1885) 35 Hun 580.

Right of assignee to foreclose.—An assignee of a mortgage has the right to exercise the power of sale contained in the mortgage. *Weir v. Birdsall*, (1898) 27 App. Div. 404, 50 N. Y. S. 275.

Cited.—This section was cited in *Waterman v. Webster*, (1888) 108 N. Y. 157, 15 N. E. 380, affirming 33 Hun 611.

§ 147. When power is a lien. A power is a lien or charge on the real property which it embraces, as against creditors, purchasers and incumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.

This section was derived from Real Property Law of 1896, § 127.

Section 147 of the Real Property Law of 1896 is now covered by section 167.

"In good faith and without notice."—The use of the words "in good faith and without notice" is susceptible of the construction that they were designed to protect those creditors who, in respect to the property, stood in an analogous position to that of purchasers in good faith and without notice, such as creditors who had loaned money or given credit to the debtor upon the representation or reasonable assumption that the property belonged to him. *Bennett v. Rosenthal*, (1880) 11 Daly 91.

Power of sale as estate in land.—A power of sale is not an estate or interest in land. *Blanchard v. Blanchard*, (1875) 4 Hun 287, 6 Thomp. & C. 551, affirmed without opinion (1877) 70 N. Y. 615.

Power of sale as lien.—A power of sale is not a lien or charge upon land when it has ceased to operate and has no practical use. *Prentice v. Janssen*, (1880) 79 N. Y. 478, affirming 14 Hun 548. See also *Mellen v. Banning*, (1893) 72 Hun 176, 25 N. Y. S. 542. And a power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor; when the purpose becomes wholly unattainable the power ceases; and this is so, although the purpose is defeated by the voluntary act of the person for whose benefit the power was created. *Hetzl v. Barber*, (1877) 69 N. Y. 1, reversing in part 6 Hun 534. But before execution a power is a lien or charge upon land. *Blanchard v. Blanchard*, (1875) 4 Hun 287, 6 Thomp. & C. 551, affirmed without opinion (1877) 70 N. Y. 615.

Where a power to sell real estate was given to executors after the expiration of a life estate, or when the youngest child became of age, with a direction to divide the proceeds equally among the testator's legal heirs, it was held that the heirs took the fee of the remainder subject to the execution of the power of sale; and upon the recovery of a judgment against one of them before the time arrives when the power could be executed, the judgment creditor acquired a lien upon the heir's interest in the land under the power. *Sayles v. Best*, (1893) 140 N. Y. 368, 35 N. E. 636, affirming 66 Hun 628 mem., 20 N. Y. S. 951.

Use of power of sale to partition.—A naked power of sale in a will contemplates a sale for cash or its equivalent, and cannot be employed by an executor to partition real estate in which the testator had an interest. *Sengens v. Fennel*, (1907) 54 Misc. 133, 103 N. Y. S. 510.

§ 148. When power is irrevocable. A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

This section was derived from Real Property Law of 1896, § 128.

Section 148 of the Real Property Law of 1896 is now covered by section 168.

How power may be granted: see *supra*, § 140.

Power in trust as distinguished from agency.—A power in trust, in its essential nature, places upon the grantee thereof a duty to execute it in favor of some person or persons other than himself. It involves a form of express fiduciary obligation similar to that of an express trust, and it therein differs from a mere agency, revocable at pleasure, which imposes no duty, but merely grants an authority to act. *Stanley v. Payne*, (1909) 65 Misc. 77, 119 N. Y. S. 570.

Irrevocable trust deed.—Where by a trust deed relating to both real and personal property two powers were created, one to convey, transfer and pay over to persons appointed in the settlor's will, and the other to convey, transfer and pay over "to such person or persons as by the laws of the state of New York then in force relating to the descent and distribution of the real and personal estate of the intestate decedents would be entitled to receive the said property if this instrument had not been executed and the said party of the first part had died seized and possessed of and being the lawful owner of the said property so invested," it was held that no power of revocation being reserved in the trust deed, it was irrevocable and upon the accounting of the trustee he could be permitted to resign and the court would appoint his successor to whom should be turned over such funds as were in the hands of the accounting party, he to convey the real estate to the substituted trustee. *Matter of Merritt*, (1916) 94 Misc. 425, 159 N. Y. S. 558.

Effect of divorce under marriage settlement.—The effect of a divorce on property rights under a marriage settlement seems well settled in this country by the authorities. If on a settlement money is payable to the wife during coverture, divorce determines the obligation to pay; but not so if the installments are payable to the wife during life. *Smith v. Terry*, (1899)

38 App. Div. 394, 56 N. Y. S. 477, affirmed without opinion (1901) 166 N. Y. 632, 60 N. E. 1120.

Cited.—This section was cited in *Marvin v. Smith*, (1871) 46 N. Y. 571, affirming 56 Barb. 600; *Rochevot v. Rochevot*, (1902) 74 App. Div. 585, 77 N. Y. S. 788; *Van Boskerck v. Herriek*, (1873) 65 Barb. 250; *Selden v. Vermilyea*, (1847) 1 Barb. 58; *Bennett v. Rosenthal*, (1880) 11 Daly 91.

§ 149. When estate for life or years is changed into a fee.

Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

This section was derived from Real Property Law of 1896, § 129.

Section 149 of the Real Property Law of 1896 is now covered by section 169.

When power of disposition absolute: see *infra*, § 153.

Judgment creditor's action: see Code Civ. Pro., § 1871 et seq.

Intent of section.—The intent of the section is that it is only where no estate in remainder is limited on the estate of the grantee of the power that such grantee is entitled to an absolute fee for all purposes, and when such remainder is limited it is a fee absolute only in respect to the rights of creditors, purchasers, and incumbrancers. *Barr v. Howell*, (1914) 85 Misc. 330, 147 N. Y. S. 483. And the section has no application where the title is vested in the trustee, and a subordinate power is given to a beneficiary under the trust. *Hume v. Randall*, (1894) 141 N. Y. 499, 36 N. E. 402, reversing 65 Hun 437, 20 N. Y. S. 352; *Dudley v. People's Trust Co.*, (1907) 57 Misc. 230, 107 N. Y. S. 930.

Application to personal property.—It has been held that the provisions of the statute relating to powers govern the creation, construction and execution of powers, so far as they can be made applicable to personal as well as to real property, and that there should not be two rules, one applicable to personal property and the other to real estate. *Cook v. Lowry*, (1884) 95 N. Y. 103; *Hutton v. Benkard*, (1883) 92 N. Y. 295; *Ullman v. Cameron*, (1904) 92 App. Div. 91, 87 N. Y. S. 148; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906; *In re Rogers*, (1914) 149 N. Y. S. 462.

When statute does not apply generally.—Where the power of disposition is not absolute and is accompanied by a trust, the statute does not apply. *Rose v. Hatch*, (1891) 125 N. Y. 427, 26 N. E. 467, affirming 55 Hun 457, 8 N. Y. S. 720; *Haynes v. Sherman*, (1889) 117 N. Y. 433, 22 N. E. 938, reversing 51 Hun 585, 4 N. Y. S. 413; *Higgins v. Downs*, (1905) 101 App. Div. 119, 91 N. Y. S. 937; *Weinstein v. Weber*, (1901) 58 App. Div. 112, 68 N. Y. S. 570; *Matter of Blauvelt*, (1890) 2 Connolly 458, 20 N. Y. S. 119; *Matter of Fernbacher*, (1886) 17 Abb. N. C. 339; *Ludlow v. Van Ness*, (1861) 8 Bosw. 178. And a power of disposition is not absolute where its performance is dependent upon some condition attached thereto. *Ackerman v. Gorton*, (1876) 67 N. Y. 63, reversing 6 Hun 301; *Stafford v. Washburn*, (1911) 145 App. Div. 784, 130 N. Y. S. 571, reversed on other grounds (1913) 208 N. Y. 536 *mem.* Thus, where after a devise in fee the will contained a devise of other "real estate" to the same devisee for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or the whole, if she should require it or deem it expedient, and upon her death a devise over to a religious society, it was held that by the last devise, the devisee took a life estate only, with a conditional power of disposal annexed, which did not operate to enlarge the estate to a fee, and only authorized a disposition by the devisee, by a conveyance which should take effect during her lifetime, not by will; also, that the limitation over was not repugnant to this devise, and was valid. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272.

The section applies only to cases in which the power of disposition is for the sole benefit of the person upon whom the power is conferred. *Stafford v.*

Washburne, (1911) 145 App. Div. 784, 130 N. Y. S. 571, dissenting opinion of Laughlin, J., on which the majority decision was reversed, (1913) 208 N. Y. 536 mem.

Application to future estates.—The language of the section applies as well to a future as to a present estate in fee in the lands which are the subject of the power, provided the power is to be executed in the lifetime of the grantee of the power. *Jackson v. Edwards*, (1839) 7 Paige 386, affirmed 22 Wend. 498. See also *Leonard v. American Baptist Home Mission Soc.*, (1885) 35 Hun 290. And by the express provisions of the section, where an absolute power of disposition is given to a life tenant it only becomes a fee for the benefit of creditors, purchasers or incumbrancers, but such an estate is made subject to any future estate limited thereon in case the power of absolute disposition is not executed. Thus, assuming that one was given an absolute power of disposition except as to creditors, purchasers or incumbrancers, the statute recognizes the right to give an estate over upon a failure to exercise that power. *Hasbrouck v. Knoblauch*, (1909) 130 App. Div. 378, 114 N. Y. S. 949. See also *McKeown v. Officer*, (1889) 53 Hun 634 mem., 6 N. Y. S. 201, affirmed (1891) 127 N. Y. 687 mem., 28 N. E. 401, 40 N. Y. St. Rep. 223.

General and beneficial power to devise.—A general and beneficial power to devise, given to a tenant for life, is "an absolute power of disposition" equally with the power to sell and convey. *Hayes v. Gunning*, (1906) 51 Misc. 517, 101 N. Y. S. 875. And an absolute power of disposition annexed to a primary devise in fee is deemed conclusive of the existence in the devisee of an absolute estate. *Van Horne v. Campbell*, (1885) 100 N. Y. 287, 3 N. E. 316, 771, 53 A. S. R. 166. See also *Baumgras v. Baumgras*, (1893) 5 Misc. 8, 24 N. Y. S. 767.

Estates for life.—Where the tenant for life has no power to alien his life estate the case does not come within the statute, although the tenant may have a power to dispose of the fee by will, but this is founded upon the assumption that the life tenant has no power to alien his life interest. *Hume v. Randall*, (1894) 141 N. Y. 499, 36 N. E. 402, reversing 65 Hun 437, 20 N. Y. S. 352. See also *Crooke v. Kings County*, (1884) 97 N. Y. 421; *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360. But where a grantee of an estate for life took also a power to alien in fee to any person by will, and no person other than the grantee of the power had by the terms of its creation any interest in its execution, it was held that the power was a general beneficial one, and that the grantees of the life estate, with such a power, could convey in fee by deed, although the instrument creating the life estate and the power attempted to restrain and prohibit any conveyance by deed. *Hume v. Randall*, (1894) 141 N. Y. 499, 36 N. E. 402, reversing 65 Hun 437, 20 N. Y. S. 352. See also *Deegan v. Wade*, (1895) 144 N. Y. 573, 39 N. E. 692, affirming 75 Hun 39, 26 N. Y. S. 989; *Dodsworth v. Dam*, (1902) 38 Misc. 684, 78 N. Y. S. 264. And a conveyance of lands to a trustee to hold during the natural life of the grantor's wife with power in said wife to convey or encumber the same with the consent of the trustee, with remainders over in case the wife should not convey or encumber before her majority and the majority of the grantor's youngest child, prescribes no trust, and the title vests in the beneficiaries named and not in the trustee; and as the absolute power of disposition was given to the wife free from any trust as to the proceeds, her life estate is by virtue of the statute changed into a fee, as against her creditors or grantees. *Scheer v. Long Island R. Co.*, (1908) 127 App. Div. 267, 111 N. Y. S. 569.

Life estate with power to dispose of corpus for support.—Where a will, after devising certain lands to the testator's widow absolutely, bequeathed the residue, real and personal, to the widow "for her use and behoof during her natural life, she to have absolute control and disposal of all the income to be derived therefrom and so much of the principal as she may deem necessary for her comfortable sustenance and support," it was held that no trust is created, but the widow is given a life estate with a power to apply the corpus to her comfortable maintenance if deemed necessary by her; and that the life estate was not turned into an absolute fee by the power to dispose of the lands or to use the principal of the personal property for support and maintenance if deemed necessary. *Hasbrouck v. Knoblauch*,

(1909) 130 App. Div. 378, 114 N. Y. S. 949. See also *Wells v. Seeley*, (1888) 47 Hun 109, 13 N. Y. St. Rep. 239.

Gift of income with right to use principal.—Where a will gave to the testatrix's husband "all the money of my income in the banks or on hand at the time of my decease. To have and use the same, interest and principal, or so much thereof as he may wish to use during his lifetime," and after his death provided that "whatever remains of the said money" should be divided between her children, it was held that the husband's title to the fund was absolute and that he was entitled to possession thereof. *Matter of Haskell*, (1896) 19 Misc. 206, 43 N. Y. S. 1144.

Fee limited upon a fee.—A fee cannot be limited upon a fee, even by way of executory devise. *Jackson v. Robins*, (1819) 16 Johns. 537.

Abolition of naked trusts.—The grantee in a deed of absolute conveyance of real property, who executes a contemporaneous declaration of trust in favor of a third person, his heirs, executors, administrators and assigns, declaring that he holds the property in trust for such person for his proper support and maintenance, the rents and profits to be paid to him, and promising upon his demand or that of his heirs, executors, administrators or assigns, to convey the premises to him or them by a good quitclaim deed warranting against all claiming under him, takes a mere naked trust which is abolished by the statute, and as trustee no legal or equitable estate vests in him, but the fee vests in the person in whose favor the trust is declared. *Wendt v. Walsh*, (1900) 164 N. Y. 154, 58 N. E. 2, modifying 49 App. Div. 184, 63 N. Y. S. 62. See also *Guental v. Guental*, (1906) 113 App. Div. 310, 98 N. Y. S. 1002; *Ullman v. Cameron*, (1904) 92 App. Div. 91, 87 N. Y. S. 148. And where no duty is imposed by deed upon the grantee to execute a power, no authority is conferred upon the courts to compel its execution. *Coleman v. Beach*, (1885) 97 N. Y. 545.

Effect of section on dower.—It has been held that by the language and intent of the section dower is excluded in cases falling thereunder. *Barr v. Howell*, (1914) 85 Misc. 330, 147 N. Y. S. 483.

Application to beneficiary of rents and profits.—The provisions of the section do not apply to a beneficiary of rents and profits, who, under section 103, is precluded from alienating his future income. *Woodbridge v. Bockes*, (1901) 59 App. Div. 503, 69 N. Y. S. 417, affirmed (1902) 170 N. Y. 596, 63 N. E. 362.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092; *Seaward v. Tasker*, (1913) 143 N. Y. S. 257; *Amsterdam First Nat. Bank v. Miller*, (1898) 24 App. Div. 551, 49 N. Y. S. 981, reversed (1900) 163 N. Y. 164, 57 N. E. 308.

§ 150. Certain powers create a fee. Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers.

This section was derived from Real Property Law of 1896, § 130.

Section 150 of the Real Property Law of 1896 is now covered by section 170.

Estates in fee simple and fee simple absolute: see *supra*, § 31.

Application to personal property.—The provisions of the section are applicable to personal property. In *re Rogers*, (1914) 149 N. Y. S. 462; *Matter of Perkin*, (1910) 68 Misc. 255, 124 N. Y. S. 998; *Dudley v. People's Trust Co.*, (1907) 57 Misc. 230, 107 N. Y. S. 930.

Title vested in trustee with subordinate power in beneficiary.—The rules laid down by sections 149, 150, 151 and 152 have no application where the title is vested in the trustee and a subordinate power is given to a beneficiary under the trust. *Dudley v. People's Trust Co.*, (1907) 57 Misc. 230, 107 N. Y. S. 930.

Power of sale as estate in land.—A power of sale is not an estate or interest in land, and the provisions of the statute on this subject are explicit. It requires an absolute power of disposition, and defines such a power to be one by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. In such a case the grantee takes a fee, subject to any future estate limited thereon, but absolute in respect to creditors and purchasers. Even a devise of real estate itself to an executor to sell, without an authority to receive the rents and profits, vests no estate in him. *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092; *Hume v. Randall*, (1894) 141 N. Y. 499, 36 N. E. 402, reversing 65 Hun 437, 20 N. Y. S. 352; *Crooke v. Kings County*, (1884) 97 N. Y. 421.

§ 151. When grantee of power has absolute fee. Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

This section was derived from Real Property Law of 1896, § 131.

Section 151 of the Real Property Law of 1896 is now covered by section 171.

Estates in fee simple and fee simple absolute: see supra, § 31.

Application to personal property.—The provisions of the section are applicable to personal property. *Dudley v. People's Trust Co.*, (1907) 57 Misc. 230, 107 N. Y. S. 930; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906.

Devise of life estate with power to use proceeds of sale.—A will which in substance gives the remainder of the estate, personal and real, to the husband of the testatrix for his natural life with liberty to use as much of the principal of the personal estate as he may need for any purpose whatsoever, and a power to sell real estate and use as much of the proceeds as he desires without accountability to the heirs without remainders over, vests the beneficiary with an absolute fee. *Ryder v. Lott*, (1908) 123 App. Div. 685, 108 N. Y. S. 46, affirmed (1910) 199 N. Y. 543 mem. And a devise to a testator's wife of all his real estate "during her natural life, to be retained or disposed of as she may think proper," creates in her an absolute fee. *Matter of Lynn*, (1901) 34 Misc. 681, 70 N. Y. S. 730.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092; *Connolly v. Connolly*, (1907) 122 App. Div. 492, 107 N. Y. S. 185.

§ 152. Effect of power to devise in certain cases. Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

This section was derived from Real Property Law of 1896, § 132.

Section 152 of the Real Property Law of 1896 is now covered by section 172.

Power to devise.—A general and beneficial power to devise, given a tenant for life, is "an absolute power of disposition" equally with the power to sell and convey. *Hayes v. Gunning*, (1906) 51 Misc. 517, 101 N. Y. S. 875.

Application to personal property.—The provisions of the section are applicable to personal property. *Dudley v. People's Trust Co.*, (1907) 57 Misc. 230, 107 N. Y. S. 930.

Cited.—This section was cited in *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092; *In re Rogers*, (1914) 149 N. Y. S. 462.

§ 153. When power of disposition absolute. Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

This section was derived from Real Property Law of 1896, § 133.

Section 153 of the Real Property Law of 1896 is now covered by section 173.

Meaning of "absolute power of disposition."—In interpreting and applying sections 149 to 152, prescribing in what cases the holder of "an absolute power of disposition" of real property shall be entitled to a fee therein equivalent to actual ownership, the requisites of such "absolute power of disposition" are to be found in section 153, which latter section must be construed by giving to the word "entire" its proper meaning and emphasis in the context of the statute so that the power of disposition shall include the right to give possession as well as to convey title. *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092. See also *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175; *Kull v. Kull*, (1885) 37 Hun 476. And the section does not relate to the title which vests in the grantee of the power, and does not provide that the grantee of an absolute power of disposition of the property shall have the fee, but that the power which is granted by which the grantee is entitled in his lifetime to dispose of the entire fee for his own benefit is deemed an absolute power. *Hasbrouck v. Knoblauch*, (1909) 130 App. Div. 378, 114 N. Y. S. 949. But a power of disposition is not absolute when its exercise is subject to the consent of any other person, or so restricted that it can be exercised only for a particular purpose. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Laus. 272; *Stafford v. Washburn*, (1911) 145 App. Div. 784, 130 N. Y. S. 571, reversed (1913) 208 N. Y. 536, on opinion of Laughlin, J., holding that the section was inapplicable because the power of disposition involved was not for the sole benefit of the person to whom the power was given. See *supra*, § 149, note.

Power of disposition by will.—The power of disposition by will has been regarded as a controlling element and a crucial test upon the question as to whether the estate given is absolute or defeasible. If the legatee can only dispose of the estate during life, then the limitation over has been sustained because within the protection of the statute. But a similar rule has not been applied where there has also been conferred upon the legatee a right to dispose of the corpus by will. *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5. And in doubtful cases where the testator shows an intention to dispose of all his estate, that construction should be adopted which favors vesting, rather than one which leads to the conclusion that the testator died without having made a full disposition of it. *Kelley v. Hogan*, (1902) 71 App. Div. 343, 76 N. Y. S. 5. Thus, a devise with power of absolute disposition, unless a life estate is expressly limited to the devisee, passes a fee by implication. *Taggart v. Murray*, (1873) 53 N. Y. 233.

Devises for benefit and support.—Under a will where all the property of the testator was devised and bequeathed to his wife for her sole use and benefit, accompanied by a clause that it was the testator's will and desire that whatever was left thereof at the decease of his wife should be received and enjoyed by her son, with an admonition to him against wastefulness, it was held that the widow took an absolute title, unaffected by the provision for her son. *Campbell v. Beaumont*, (1883) 91 N. Y. 464. See also *Hart v. Castle*, (1890) 63 Hun 643 mem., 9 N. Y. S. 622. And where a will gave land to the widow, "to have and to hold for her benefit and support," it was held that no intent was discoverable to pass a less estate than a fee. *Crain v. Wright*, (1889) 114 N. Y. 307, 21 N. E. 401, affirming 36 Hun 74.

Claims of creditors and legatees.—An absolute power of disposition will only be deemed to carry a fee where the grantee of the power is authorized thereby to dispose of the estate for his own benefit, and not where creditors and legatees are to be paid out of the avails, though the grantee be entitled to the residue. *Germond v. Jones*, (1842) 2 Hill 569.

Application to personal property.—The statutory definition of an absolute power of disposition applies to personal property as well as to real property. *Seaward v. Tasker*, (1913) 143 N. Y. S. 257.

§ 154. Power subject to condition. A general and beneficial power may be created subject to a condition precedent or subsequent, and until the power becomes absolutely vested it is not subject to any provisions of the last four sections.

This section was derived from Real Property Law of 1896, § 134.

Section 154 of the Real Property Law of 1896 is now covered by section 174.

Reservation of a power: see *supra*, § 144.

Words of limitation and of purchase.—That words of limitation may be construed as words of purchase, and words of purchase as words of limitation, and that the general meaning of either may be limited when the sense and context require it to effectuate the intent of the testator, is settled by numerous authorities. *Taggart v. Murray*, (1873) 53 N. Y. 233.

Reservation of power to married woman.—A power general or special, beneficial or in trust, may be reserved to a married woman by a marriage settlement, by which the entire legal estate is vested in trustees. *Wright v. Tallmadge*, (1857) 15 N. Y. 307.

§ 155. Power of life tenant to make leases. The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished.

This section was derived from Real Property Law of 1896, § 135.

Section 155 of the Real Property Law of 1896 is now covered by section 175.

Rent due on life leases recoverable: see *infra*, § 221.

§ 156. Effect of mortgage by grantee. A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are:

1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and,
2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.

This section was derived from Real Property Law of 1896, § 136.

Section 156 of the Real Property Law of 1896 is now covered by section 176.

Section as relating to beneficial powers.—It has been held that the section relates solely to beneficial powers. *Marvin v. Smith*, (1870) 56 Barb. 600, affirmed (1871) 46 N. Y. 571.

§ 157. When a trust power is imperative. A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on

the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

This section was derived from Real Property Law of 1896, § 137.

Section 157 of the Real Property Law of 1896 is now covered by section 177.

When creditor may compel execution of trust power: see *infra*, § 162.

How power must be executed: see *infra*, § 165.

Construction of instrument creating a power.—An instrument creating a power, like all other instruments, must receive a reasonable construction, and the intention of the party executing the instrument is to be ascertained from the language used, the situation of the parties, and all the surrounding circumstances. *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342; *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382; *Kemp v. Kemp*, (1901) 36 Misc. 79, 72 N. Y. S. 617. See also *Delafield v. Shipman*, (1886) 103 N. Y. 463, 9 N. E. 184, reversing 34 Hun 514.

Nonenforceable trust power.—Trust powers are imperative and their performance may be compelled in equity. A nonenforceable trust power is an impossibility, unless by the instrument creating it, its execution or nonexecution is made expressly to depend on the will of the grantee. *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382; *Kemp v. Kemp*, (1901) 36 Misc. 79, 72 N. Y. S. 617; *Weber v. Lester*, (1896) 56 Hun 643 *mem.*, 10 N. Y. S. 258, affirmed without opinion (1891) 125 N. Y. 742, 27 N. E. 407. See also *Van Boskerck v. Herrick*, (1873) 65 Barb. 250; *Arnold v. Gilbert*, (1849) 5 Barb. 190. But equity will not interfere to compel the execution of a power if the purpose has been accomplished without its exercise. *Prentice v. Janssen*, (1880) 79 N. Y. 478, affirming 14 Hun 548. See also *Hayes v. Kerr*, (1897) 19 App. Div. 91, 45 N. Y. S. 1050.

Exercise of imperative power of sale.—Whenever a power or authority to sell is given by will to executors, without limitation and not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out. *Matter of Gautert*, (1892) 136 N. Y. 106, 32 N. E. 551, affirming 63 Hun 280, 17 N. Y. S. 910. See also *Clift v. Moses*, (1889) 116 N. Y. 144, 22 N. E. 393, affirming 44 Hun 312, 7 N. Y. St. Rep. 691; *Farrar v. McCue*, (1882) 89 N. Y. 139; *Fisher v. Banta*, (1876) 66 N. Y. 468, affirming 4 Hun 425; *Hughes v. Mackin*, (1897) 16 App. Div. 291, 44 N. Y. S. 710. And the validity of a power of sale given to executors by a will is a question primarily of legal, not of equitable, cognizance, and so is a question for a court of law, as distinguished from a court of equity. *Mellen v. Mellen*, (1893) 139 N. Y. 210, 34 N. E. 925, affirming 60 Hun 151, 14 N. Y. S. 665.

Power of sale discretionary as to time of execution.—A power of sale may be imperative even though a discretion is reposed in the executor as to the time of sale, and the court, upon proof of unreasonable delay, will compel him to act. *Haight v. Brisbin*, (1881) 96 N. Y. 132; *Walbridge v. Brooklyn Trust Co.*, (1911) 143 App. Div. 502, 128 N. Y. S. 686. See also *Waldron v. Selang*, (1888) 47 Hun 252, 13 N. Y. St. Rep. 401; *Stewart v. Hamilton*, (1885) 37 Hun 19. And where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion, and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale. *Lent v. Howard*, (1882) 89 N. Y. 169; *Power v. Cassidy*, (1880) 79 N. Y. 602, 35 Am. Rep. 550, affirming 16 Hun 294. See also *Moncrief v. Ross*, (1872) 50 N. Y. 431; *Waldron v. Selang*, (1888) 47 Hun 252, 13 N. Y. St. Rep. 401.

Compulsory exercise of power of sale by creditors.—The exercise of an imperative power of sale may be compelled in favor of any party lawfully entitled under the provisions of the will to the proceeds of the real estate when sold, and so, may be compelled by a creditor whose debt is directed by the will to be paid and for the satisfaction of which the personal estate proves insufficient. *Matter of Gautert*, (1892) 136 N. Y. 106, 32 N. E. 551, affirming 63 Hun 280, 17 N. Y. S. 910. See also *Haight v. Brisbin*, (1884) 96 N. Y. 132; *Moncrief v. Ross*, (1872) 50 N. Y. 431. But the exercise of a discretionary power of sale cannot be compelled in equity for the benefit of the decedent's creditors. *Matter of Johnson*, (1897) 18 App. Div. 371, 46 N. Y. S. 53.

When power of sale may be exercised by administrator with will annexed.—Where a power of sale is given to executors for the purpose of paying debts or legacies, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of the executor and under the statute passes to and may be exercised by an administrator with the will annexed. *Mott v. Ackerman*, (1883) 92 N. Y. 539.

Effect of court's execution of power upon the fee.—Where the execution of a power is compelled by the court, it operates to suspend the vesting of the fee until the power is executed or the estate is terminated. *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21. See also *Delaney v. McCormack*, (1882) 88 N. Y. 174; *Matter of Keenan*, (1895) 15 Misc. 368, 38 N. Y. S. 426.

Reservation of power to create future estate.—Where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power unless coupled with a trust is not imperative, but its execution depends entirely upon the will of the grantor, and it is only when a power is in trust that a court of equity will decree its execution. *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342. See also *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382.

Death of donee before execution of power.—When the donee of a power such as is referred to in this section dies without executing it, equity will regard as done what it was the duty of the trustee to do, and so the title vests in the person for whose benefit the power was created. *Towler v. Towler*, (1894) 142 N. Y. 371, 36 N. E. 869, affirming 65 Hun 457, 20 N. Y. S. 342; *Smith v. Floyd*, (1893) 140 N. Y. 337, 35 N. E. 606. See also *Coleman v. Beach*, (1885) 97 N. Y. 545; *Meldon v. Devlin*, (1898) 31 App. Div. 146, 53 N. Y. S. 172, affirmed (1901) 167 N. Y. 573, 60 N. E. 1116. And the existence of a power in trust, once valid in itself and once capable of execution but now incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case for the exercise of the equitable power of the court to remove a cloud upon the title, by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power. *Hothkiss v. Elting*, (1861) 36 Barb. 38.

Enforcement of trust mortgage.—A mortgage executed in trust for the benefit of minor children, the execution or nonexecution of which did not depend upon the will of the mortgagee, was held to impose an imperative duty upon him, which could be enforced in equity for the benefit of the parties interested. *Kirsch v. Tozier*, (1892) 63 Hun 607, 18 N. Y. S. 334, affirmed (1894) 143 N. Y. 390, 38 N. E. 375, 42 A. S. R. 729.

Enforcement of power to receive rents and profits.—A power to receive the rents and profits of lands is imperative, and its performance may be compelled for the benefit of the parties interested therein. *Fellows v. Heermans*, (1870) 4 Lans. 230.

§ 158. Distribution when more than one beneficiary. Where a disposition under a power is directed to be made to, among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of

the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.

This section was derived from Real Property Law of 1896, § 138.

Section 158 of the Real Property Law of 1896 is now covered by section 178.

Persons embraced within a class.—While under the statute there may be a power of selection or exclusion with regard to the designated objects, the power of selection must be so defined that there are persons who can come into court and say they are embraced within the class, and demand the enforcement of the power. *Tilden v. Green*, (1891) 130 N. Y. 29, 28 N. E. 880, 27 A. S. R. 487, 14 L. R. A. 33, affirming 54 Hun 231, 7 N. Y. S. 382. And a power to select beneficiaries from all the members of the community, or all corporations of a particular class, wherever they may exist, however numerous, is void for indefiniteness. *Read v. Williams*, (1891) 125 N. Y. 560, 26 N. E. 730, 21 A. S. R. 748.

Devise with discretionary power to divide.—Where a will gave the whole residuary estate to a son of the testatrix for the use and benefit of himself and his sisters "in such proportions and at such times and in such manner as he . . . shall in his judgment and discretion deem proper, right and advisable," and stated that the testatrix had full confidence in the integrity and justice of her son, and vested him with the legal title and full discretion to use the property for the benefit of himself and sisters, it was held that there was no legal duty or trust imposed upon the son, and that he could give such portion to his sisters as he might choose to give, or he might give nothing. *Matter of Steiner*, (1909) 134 App. Div. 162, 118 N. Y. S. 833.

Direction to "distribute and apportion."—Where a testamentary direction was to "distribute and apportion" among the testator's wife and children, and only the manner and time were left to the judgment of the executors, it was held that the direction to "apportion" meant share and share alike. *Matter of Connor*, (1896) 6 App. Div. 594, 39 N. Y. S. 900, affirmed without opinion (1898) 155 N. Y. 627, 49 N. E. 1095.

Devise to "children."—A devise to "children" in its primary and ordinary sense means a devise to the immediate descendants of the persons named, and where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include grandchildren. *Shannon v. Pickell*, (1889) 55 Hun 127, 8 N. Y. S. 584. See also *Matter of Pulis*, (1917) 220 N. Y. 196, 115 N. E. 516, modifying 175 App. Div. 884, 160 N. Y. S. 1143; *Palmer v. Horn*, (1881) 84 N. Y. 516, affirming 20 Hun 70; *Prowitt v. Rodman*, (1867) 37 N. Y. 42.

Devise to "issue."—Generally and in the absence of any indication of a contrary intention the word "issue" in a devise includes in its meaning all descendants; and practically it may have the same effect as the use of the term "heirs of the body." *Drake v. Drake*, (1892) 134 N. Y. 220, 32 N. E. 114, 17 L. R. A. 664, affirming 56 Hun 590, 10 N. Y. S. 183.

§ 159. Beneficial power subject to creditors. A special and beneficial power is liable to the claims of creditors in the same manner as other interests that can not be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled.

This section was derived from Real Property Law of 1896, § 139.

Section 159 of the Real Property Law of 1896 is now covered by section 179.

Beneficial power generally and capacity to take beneficial power: see *supra*, §§ 136, 143.

Limitation of section.—The section by its terms relates solely to a beneficial power, and where the power is not beneficial it does not fall within the section. *Marvin v. Smith*, (1870) 56 Barb. 600, affirmed (1871) 46 N. Y. 571.

But the section should not be construed as declaratory that every special and beneficial power, ipso facto, that it is a special and beneficial power, is liable to the claims of creditors, but as declaratory that when a special and beneficial power, by reason of the provisions of the article operating on the terms of the power, is liable to the claims of creditors, the liability is enforceable by a creditor's action, or in any other manner that other debtor interests that cannot be reached by law may be reached in equity; and that when the grantee of the power refuses or neglects to execute the power, or mistakes in the manner of the execution, the execution in proper mode may be decreed for the benefit of any creditor who has a right thereby. *Cutting v. Cutting*, (1881) 86 N. Y. 522, reversing in part 20 Hun 360. Thus, where a power to sell real estate was given to executors after the expiration of a life estate, or when the youngest child became of age, with a direction to divide the proceeds equally among the testator's legal heirs, it was held that the heirs took the fee of the remainder subject to the execution of the power of sale; and upon the recovery of a judgment against one of them before the time arrived when the power could be executed, the judgment creditor acquired a lien upon the heir's interest in the land, which followed and attached his interest in the proceeds, when a sale was had under the power. *Sayles v. Best*, (1893) 140 N. Y. 368, 35 N. E. 636.

§ 160. Execution of power on death of trustee. If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust.

This section was derived from Real Property Law of 1896, § 140.

Section 160 of the Real Property Law of 1896 is now covered by section 180. *Resignation or removal of trustee and appointment of successor: see supra*, § 112.

Right of substituted trustee to exercise power conferred on original trustee: see notes, 16 Ann. Cas. 325; Ann. Cas. 1913A 1283.

Application to personal property.—The section is a declaration of a general rule applicable to all trust powers and governs trusts of personal as well as real property. *Holland v. Alcock*, (1888) 108 N. Y. 312, 16 N. E. 305, 2 A. S. R. 420, reversing 40 Hun 372; *Dominick v. Sayre*, (1850) 3 Sandf. 555.

Delegation of execution.—When a donee of a power has been given a discretion to exercise it for the benefit of others he must exercise the discretion, and its execution cannot be delegated to others, and in case he, for any reason, fails to exercise the discretion and the power falls upon the court for execution, the court distributes equally among the whole class in which the donee was authorized to exercise his discretion. *People v. Powers*, (1895) 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502, reversing 83 Hun 449, 31 N. Y. S. 1131. And it is a well settled principle, that a court of equity will not permit a devise in trust, which is valid in other respects, to fail for the want of a trustee. *Leggett v. Hunter*, (1859) 19 N. Y. 445, affirming 25 Barb. 81; *Clark v. Crego*, (1867) 47 Barb. 599, affirmed without opinion (1873) 51 N. Y. 646.

Cited.—This section was cited in *Shannon v. Pickell*, (1889) 55 Hun 127, 8 N. Y. S. 584; *Hoe v. Kenny*, (1857) 25 Barb. 396.

§ 161. When power devolves on court. Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution devolves on the supreme court.

This section was derived from Real Property Law of 1896, § 141.

Section 161 of the Real Property Law of 1896 is now covered by section 181.

When trusts vest in Supreme Court: see PERSONAL PROPERTY LAW, § 20.

Inherent power of Supreme Court.—The Supreme Court has inherent power to execute a trust, and in the absence of a trustee it may and will take upon

itself its execution. *Myers v. McCullagh*, (1901) 63 App. Div. 321, 71 N. Y. S. 520; *Crocheron v. Jaques*, (1838) 3 Edw. Ch. 207. And the trustee, when appointed, is the successor of the court in the administration of the trust, and will be bound by its judgments and directions now given with respect to the trust estate, to the same extent as if he had been a party to the action. *Kirk v. Kirk*, (1893) 137 N. Y. 510, 33 N. E. 552.

Execution of power of sale when executor not named.—A power of sale given in a will, when no person is named to execute it, may be executed by the executor named therein. *Meakings v. Cromwell*, (1851) 5 N. Y. 136, affirming 2 Sandf. 512. See also *Bogert v. Hertell*, (1842) 4 Hill 492.

Application to personal property.—The section is declaratory of a general rule applicable to all trust powers, and governs trusts of personal as well as real property. *Holland v. Alcock*, (1888) 108 N. Y. 312, 16 N. E. 305, 2 A. S. R. 420, reversing 40 Hun 372.

§ 162. When creditors may compel execution of trust power.

The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable.

This section was derived from Real Property Law of 1896, § 142.

Section 162 of the Real Property Law of 1896 is now covered by section 182.

Surplus income of trust property liable to creditors: see supra, § 98.

What trust interest may be alienated: see supra, § 103.

When trust power is imperative: see supra, § 157.

Beneficial power subject to creditors: see supra, § 159.

Enforcement by assignee or creditor.—Under the section an assignee or creditor can enforce the execution of a trust power in equity, the same as the person for whose benefit the power was created. *Clark v. Crego*, (1867) 47 Barb. 599, affirmed (1873) 51 N. Y. 646.

Cited.—This section was cited in *Marvin v. Smith*, (1870) 56 Barb. 600, affirmed (1871) 46 N. Y. 571.

§ 163. Defective execution of trust power. Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.

This section was derived from Real Property Law of 1896, § 143.

Disposition not void because too extensive: see infra, § 177.

General rule as to execution of power.—The general rule is, that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise. *Allen v. De Witt*, (1850) 3 N. Y. 276. But the execution of a power will not be defeated because of some provision in excess of the power, which may be eliminated without disturbing the general scheme. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282. See also *Austin v. Oakes*, (1890) 117 N. Y. 577, 23 N. E. 193, modifying 48 Hun 492, 1 N. Y. S. 307.

§ 164. Effect of insolvent assignment. A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors.

This section was derived from Real Property Law of 1896, § 144.

General assignments for benefit of creditors: see DEBTOR AND CREDITOR LAW, § 3 et seq.

Cited.—This section was cited in *Marvin v. Smith*, (1870) 56 Barb. 600, affirmed (1871) 46 N. Y. 571; *Clark v. Crego*, (1867) 47 Barb. 599, affirmed (1873) 51 N. Y. 646.

§ 165. How power must be executed. A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner.

This section was derived from Real Property Law of 1896, § 145.

How power may be granted: see supra, § 140.

When written conveyance necessary: see infra, § 242.

May power of disposition be exercised by will in absence of express provision to that effect: see L. R. A. 1916C 1046 note.

Who can execute power.—Only those who can alien lands can execute a power. *Barber v. Cary*, (1854) 11 N. Y. 397; *Van Boskerek v. Herrick*, (1873) 65 Barb. 250. And it can only be created to do an act which the grantor himself can lawfully perform. *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615; *Jackson v. Edwards*, (1839) 22 Wend. 498. As to who, aside from donee or grantee expressly named, may exercise power of sale, see 50 L. R. A. (N. S.) 604 note. As to whether less than all the donees or grantees named may exercise power of sale of real estate, see 59 L. R. A. (N. S.) 622 note.

Words necessary to create power.—No precise form of words is necessary to create a power. Any words, however informal, which clearly indicate an intention to give a power, are sufficient. *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615; *Freeborn v. Wagner*, (1867) 49 Barb. 43, affirmed 4 Keyes 27, 2 Abb. App. Dec. 175.

General rule as to execution of power.—The general rule is, that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise. *Allen v. De Witt*, (1850) 3 N. Y. 276.

§ 166. Execution by survivors. Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors.

This section was derived from Real Property Law of 1896, § 146.

Execution of power on death of trustee: see supra, § 160.

When all must consent: see infra, § 174.

Power to sell, mortgage or lease real estate may be executed by qualifying executors, trustees or successors: see Code Civ. Pro., §§ 2694, 2696.

Common-law rule.—At common law, when the execution of a power was imposed upon two or more persons, the rule was that all must join in its execution. *Matter of Wilkin*, (1904) 90 App. Div. 324, 86 N. Y. S. 360. But those powers which were coupled with an interest or annexed to the office of the trustees passed with the trust to the survivors or successors of the original trustees and could be exercised by them. *Lane v. Hustace*, (1913) 154 App. Div. 636, 139 N. Y. S. 784. See also *Major v. Major*, (1917) 177 App. Div. 102, 163 N. Y. S. 925.

Execution of power of sale.—A power of sale may be executed by surviving executors or trustees. *Danaher v. Hilderbrand*, (1911) 72 Misc. 240, 131 N. Y. S. 127; *Lewine v. Gerardo*, (1908) 60 Misc. 261, 112 N. Y. S. 192. See also *Lane v. Hustace*, (1913) 154 App. Div. 636, 139 N. Y. S. 784; *Van Boskerek v. Herrick*, (1873) 65 Barb. 250. But all living and qualified trustees must join in the execution of a power. *Whitlock v. Washburn*, (1891) 62 Hun 369, 17 N. Y. S. 60. See also *Matter of Wilkin*, (1904) 90 App. Div.

324, 86 N. Y. S. 360. Thus where title is vested in two executors in trust, with power of sale, one of the executors cannot, without the assent of the other, enter into a contract to convey, which will be valid and binding upon the other. *Wilder v. Ranney*, (1884) 95 N. Y. 7.

Direction to convey jointly and not singly.—Where a will contained the following power of sale: "I do hereby give to my executors and trustees [the plaintiff and the testator's widow], full and complete power to sell and dispose of my said real estate at such time, in such manner and on such terms as they shall jointly consider beneficial and for the interest of my estate, with full power to convey by deed jointly and not singly, as I might or could do if living," it was held that this power terminated upon the death of the testator's widow. *Herriott v. Prime*, (1895) 87 Hun 95, 33 N. Y. S. 970, affirmed (1898) 155 N. Y. 5, 49 N. E. 142.

Resignation as trustee of executor.—The acceptance of the resignation, as trustee, of a person named as executor in a will does not have the effect to relieve him from the execution, so far as it remains unexecuted, of the trust developed upon him as executor. *Greenland v. Waddell*, (1889) 116 N. Y. 234, 22 N. E. 367, 15 A. S. R. 400. See also *Quackenboss v. Southwick*, (1869) 41 N. Y. 117; *Matter of Van Wyck*, (1846) 1 Barb. Ch. 565. But where power to sell is given to two or more executors or trustees *ratione officii* and one resigns or is removed before the power has been fully executed, the remaining executors or trustees may validly execute the power. *Striker v. Daly*, (1916) 175 App. Div. 620, 162 N. Y. S. 527.

Neglect to qualify as executor.—The power to execute conveyances given by will to executors must be executed only by those to whom letters testamentary are granted. *Ogden v. Smith*, (1830) 2 Paige 195. Thus where a testator appointed three executors and authorized them, or the survivor of them, to sell and convey any part of his real estate for the purpose of paying his debts, two of whom neglected to qualify, but the third took out letters testamentary in his own name, and sold and conveyed a portion of the real estate for the purpose specified, it was held that his conveyance was valid and passed good title. *Taylor v. Morris*, (1848) 1 N. Y. 341.

§ 167. Execution of power to dispose by devise. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law.

This section was derived from Real Property Law of 1896, § 147.

Certain devises to be deemed powers: see *supra*, § 97.

When devise operates as execution of power: see *infra*, § 176.

Manner of execution of will: see DECEDENT ESTATE LAW, § 21.

When power takes effect. A power created under the section takes effect only from the time of the testator's death. In re *Johnson*, (1892) 19 N. Y. S. 963. See also *Genet v. Hunt*, (1889) 112 N. Y. 158, 21 N. E. 91; *Matter of Gardner*, (1893) 110 N. Y. 122, 35 N. E. 439, affirming 69 Hun 50, 23 N. Y. S. 429.

After-acquired real estate.—After-acquired real estate does not pass by will, unless it contain a general devise, or language indicating the intention of the testator that it should so operate. *Lynes v. Townsend*, (1865) 33 N. Y. 558.

"As required by law."—The expression "as required by law" refers to the law of the domicile of the testator. *Ward v. Starnard*, (1905) 82 App. Div. 386, 81 N. Y. S. 906. And the law of the place where real property is situated determines all questions relating to its transfer. *Genet v. Delaware, etc., Canal Co.*, (1895) 13 Misc. 409, 35 N. Y. S. 147, reversed on other grounds 1 App. Div. 631 *mem.*, 37 N. Y. S. 610, affirmed (1890) 122 N. Y. 505.

§ 168. Execution of power to dispose by grant. Where a power is confined to a disposition by grant, it can not be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.

This section was derived from Real Property Law of 1896, § 148.

Power of appointment to be executed by will.—A power of appointment to be executed by will is in its nature ambulatory, and its exercise is intended to represent the final judgment of the donee. Such a power cannot be exercised by grant, nor can it be executed by force of a contract to make a will; hence such a contract controlling the exercise of the power is not enforceable in equity. *Farmers' Loan, etc., Co. v. Mortimer*, (1916) 219 N. Y. 290, 114 N. E. 389, affirming 157 App. Div. 915, 142 N. Y. S. 1117.

Rule as to controversies between grantor and grantee.—The rule governing controversies between grantor and grantee, by which the language of a conveyance is required to be taken most strongly against the grantor, has no application when the dispute occurs between parties claiming under the same conveyance, and if it is the clear intent of the grantor that apparently inconsistent provisions of a conveyance shall all stand, such limitations upon and interpretations of the literal signification of the language used will be imposed as will give effect if possible to all of the provisions. *Coleman v. Beach*, (1885) 97 N. Y. 545.

§ 169. When direction by grantor does not render power void.

Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the provisions of this article.

This section was derived from Real Property Law of 1896, § 149.

How power must be executed: see *supra*, § 165.

Purchaser under defective execution: see *infra*, § 180.

§ 170. When directions by grantor need not be followed.

Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power.

This section was derived from Real Property Law of 1896, § 150.

How power must be executed: see *supra*, § 165.

§ 171. Nominal conditions may be disregarded. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

This section was derived from Real Property Law of 1896, § 151.

General rule of construction.—Where, upon examination of a will taken as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt or inaccurate modes of expression, the court may, and it is its duty to, subordinate the language to the intention; it may reject words and limitations, supply or transpose them to get at the correct meaning. *Phillips v. Davies*, (1883) 92 N. Y. 199. And although the language used in the creation of a power may be directory, it may be held not intended to be mandatory. *Faile v. Crawford*, (1898) 30 App. Div. 536, 52 N. Y. S. 353. But where an executor has a mere naked or collateral power, with no beneficial interest whatever in the land or its proceeds, the power can only be exercised in the manner and for the precise purpose declared and intended by the donor, and that where that purpose cannot be effectuated the power fails. *Lindo v. Murray*, (1895) 91 Hun 335, 36 N. Y. S. 231, affirmed without opinion (1898) 157 N. Y. 697, 51 N. E. 1091.

Right to annex conditions.—The section clearly recognizes the right of the grantor of a power to annex conditions, and permits such only as are merely nominal to be disregarded. Thus, a condition attached to a power of sale contained in a trust deed, that the trustee shall only sell by and with the consent of the grantor, to be manifested by his uniting in the conveyance, is valid. It is an essential condition and cannot be dispensed with. *Kissam v. Dierkes*, (1872) 49 N. Y. 602.

Provision in excess of the power.—The execution of a power will not be defeated because of some provision in the appointment made which is in excess of the power, when such provision may be eliminated without disturbing the general scheme; and a general and unlimited power of appointment to be exercised in the future is not void, because under it the donee may, without departing from the express language, attempt to create an illegal estate; the legal effect of the power is simply to authorize the donee to do what is lawful. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282.

Qualification of power of sale.—A qualified power of sale may be so limited by restrictions that it is practically inoperative, and where it can prove no convenience to the devisees or the estate it may be wholly disregarded, as where a testator declares that none of the real estate shall be sold, except in case of absolute necessity and for the benefit of the estate, and then only upon the consent of his heirs. *Macy v. Sawyer*, (1883) 66 How. Pr. 381.

§ 172. Intent of grantor to be observed. Except as provided in this article, the intentions of the grantor of a power as to the manner, time and conditions of its execution must be observed; subject to the power of the supreme court to supply a defective execution as provided in this article.

This section was derived from Real Property Law of 1896, § 152.

Omission to recite power: see *infra*, § 175.

General rule.—The general rule is that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise. *Allen v. De Witt*, (1850) 3 N. Y. 276. And in all cases it is incumbent upon the court to observe the intention of the grantor or creator of the trust. *Schreyer v. Schreyer*, (1905) 101 App. Div. 456, 91 N. Y. S. 1065, affirmed (1905) 182 N. Y. 555, 75 N. E. 1134; *Rochevot v. Rochevot*, (1902) 74 App. Div. 585, 77 N. Y. S. 788.

§ 173. Consent of grantor or third person to execution of power. Where the consent of the grantor or a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or in a written certificate. In the first case, the instrument of execution, in the second, the certificate, must be subscribed by the person whose consent is necessary; and to entitle the instrument to be recorded, such signature must be acknowledged or proved and certified in like manner as a deed to be recorded.

This section was derived from Real Property Law of 1896, § 153. The report of the Board of Statutory Consolidation (1907), page 4903, has the following note relating to this section: "As section 173 now stands, it literally requires that the consent of grantor or of a third person be a part of the instrument executing the power. Yet conveyancers commonly are of the opinion that a written consent contained in a separate instrument, if such consent is proved or acknowledged, satisfies the statute. There are no reported cases bearing expressly on this point. But as conveyancers in the city of New York customarily adopt the view denoted, it should be made clear by statute. It is sometimes extremely inconvenient to send a deed in

execution of a power to Europe, or elsewhere, in order to have this consent of third persons indorsed thereon. There seems to be no good reason why the consent of third persons to the execution of a power should not be contained in a separate instrument in writing, if such instrument is duly proved or acknowledged. The other course now prescribed by the statute is very inconvenient and its necessity is actually ignored in practice by many conveyancers. This is one of the rare cases where the original provisions of the Revised Statutes relating to real property seem susceptible of improvement."

Acknowledgment or proof of conveyances: see *infra*, § 292.

Scope of section.—The section relates merely to the manner of authenticating the consent of a third party, when such consent is a condition. *Kissam v. Dierkes*, (1872) 49 N. Y. 602. And while only those who can alien lands can execute a power, there is no such restriction as to those who may consent to its execution. *Barber v. Cary*, (1854) 11 N. Y. 397.

Effect of deed not in compliance with section.—A deed which contains no recital in compliance with the provisions of the section, and is not in conformity to the condition authorizing the exercise of the power, passes no title. *Gardner v. Dembinsky*, (1900) 52 App. Div. 473, 65 N. Y. S. 183, affirmed without opinion (1902) 170 N. Y. 593, 63 N. E. 1117. See also *Stokes v. Hyde*, (1897) 14 App. Div. 530, 44 N. Y. S. 132.

Revocation.—While the section requires that the consent of a necessary person to the execution of a power must be expressed in the instrument by which the power is executed, or in a written certificate thereon, executed and acknowledged in like manner as deeds are required to be executed, yet where the act of revocation as between the parties expresses a clear intention to revoke and the rights of third persons are in nowise affected and the trust instrument in itself does not provide in particular form how the revocation shall be executed, an instrument which clearly expresses the intention to revoke and is sufficient to accomplish such a purpose will be regarded as working such a result, even though it be not executed in the particular form required by the statute. *Schreyer v. Schreyer*, (1905) 101 App. Div. 456, 91 N. Y. S. 1965, affirmed (1905) 182 N. Y. 555, 75 N. E. 1134.

Submission of controversy.—Where lands were devised to the testator's wife for life, remainder to the testator's brothers and sisters living at the wife's decease, in equal portions, with a power in the executor to sell the lands with the consent of the wife, it was held that the court would not determine, on a submission of the controversy, whether the consent of the wife to the sale by the executor was given in accordance with the statute so as to transfer a marketable title, if the remaindermen, or their representatives, have not been made parties. *Des Caso v. Stiles*, (1914) 161 App. Div. 871, 147 N. Y. S. 9.

§ 174. When all must consent. Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power.

This section was derived from Real Property Law of 1896, § 154.

Execution on death of trustee: see *supra*, § 160.

Execution by survivors: see *supra*, § 166.

Section as declaratory of common-law rule.—At common law, where a power was to be executed with the consent of third persons, the death of one such parties, before consent was given, rendered its execution impossible; and this rule has not been changed by statute. *Barber v. Cary*, (1854) 11 N. Y. 397. See also *Matter of Wilkins*, (1904) 90 App. Div. 324, 86 N. Y. S. 360. But so long as there remains one of the trustees still living and acting, and the powers of the trust were intended to devolve upon him, he may execute the same. *Weeks v. Frankel*, (1910) 197 N. Y. 304, 90 N. E. 969, reversing 128 App. Div. 223, 112 N. Y. S. 562.

Retroactive effect of section.—There is nothing in the provisions of the section suggesting that it was intended to have a retroactive effect. Thus, where the will of a testator who died in 1870 authorized the executrix, with the consent of her mother, they being joint life tenants, to sell the real estate,

and the mother died in 1875, without having given her consent to a sale, it was held that the mother's death operated to terminate the power of sale, and it could not thereafter be exercised by the executrix. *Gulick v. Griswold*, (1899) 160 N. Y. 399, 54 N. E. 780, affirming 14 App. Div. 85, 43 N. Y. S. 443. See also *Wells v. Brooklyn Union El. R. Co.*, (1907) 121 App. Div. 491, 106 N. Y. S. 77, affirmed without opinion (1908) 193 N. Y. 641, 86 N. E. 1134.

Cited.—This section was cited in *Schreyer v. Schreyer*, (1905) 101 App. Div. 456, 91 N. Y. S. 1065, affirmed (1905) 182 N. Y. 555, 75 N. E. 1134.

§ 175. Omission to recite power. An instrument executed by the grantee of a power, conveying an estate or creating a charge, which he would have no right to convey or create, except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein.

This section was derived from Real Property Law of 1896, § 155.

Necessity of reference to power: see Ann. Cas. 1913D 228 note.

General devise without referring to power: see notes, 16 Ann. Cas. 203; Ann. Cas. 1914D 586.

Scope and application.—The statute refers only to those cases where the grantee executes the instrument, but nowhere refers to the source from which he claims to derive the authority so to do. In a case where a person, in an instrument, expressly states that he proposes to execute a certain power, which he believes to have been given him, and has no intention of executing another power, which he does not believe he possesses, the statute does not hold the instrument executed to be an exercise of a power which the maker of the instrument did not believe he possessed, and had no intention of exercising, and as is shown by the instrument itself. *Pollock v. Hooley*, (1893) 67 Hun 370, 22 N. Y. S. 215.

When section does not apply.—Where one has independent interests in the property, his conveyance must be construed as relating to them, and the statutory provision, validating a conveyance by the grantee of a power, as in execution thereof, although the power be not referred to therein, has no application. *Weinstein v. Weber*, (1904) 178 N. Y. 94, 70 N. E. 115, affirming 78 App. Div. 645, 81 N. Y. S. 62; *Pepper v. Cutler*, (1912) 78 Misc. 532, 139 N. Y. S. 976. See also *Hogle v. Hogle*, (1888) 49 Hun 313, 2 N. Y. S. 172. Thus it was said in *Mutual Life Ins. Co. v. Shipman*, (1890) 119 N. Y. 324, 24 N. E. 177, reversing 50 Hun 578, 3 N. Y. S. 684: "The rule was founded in reason and good sense, and was intended to provide that whenever a single power exists, under which a grantor may convey or mortgage real estate, his conveyance is attributable to the exercise of the power actually possessed by him; but that whenever, in addition to a power, he is also invested with other independent interests or powers, whether legal or equitable, with respect to the same property, under the authority of either of which he may lawfully act, the rule of the statute should not apply." See also *Weinstein v. Weber*, (1901) 58 App. Div. 112, 68 N. Y. S. 570. And the section does not change the rule of the common law as to the effect of a conveyance by the donee of a power, who is also the possessor of other interests in the property to which the power relates, when in the conveyance no mention is made of the power. *Vines v. Clarke*, (1906) 111 App. Div. 12, 97 N. Y. S. 532.

Intention.—It has been uniformly held that it is unnecessary to refer to the power, if an intention to execute it plainly appears. *White v. Hicks*, (1865) 33 N. Y. 383, affirming 43 Barb. 64. And before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifest. *Forster v. Winfield*, (1894) 142 N. Y. 327, 37 N. E. 111, 59 N. Y. St. Rep. 11, reversing 3 Misc. 425, 23 N. Y. S. 169.

Conveyance by one having power coupled with interest.—Although a deed by one holding a power is presumed to be made in the exercise of that power, though not referred to, yet when the power is coupled with an interest, legal or equitable, the presumption is that a deed not referring to the power conveys the interest only. *Merolla v. Lane*, (1907) 122 App. Div. 535, 107 N. Y. S. 439.

Failure to recite power in trustee's deed.—Where a trustee has no individual interest in the lands, but only such as is derived under a trust, his conveyance passes valid title, although the power is not recited in the deed. *Albany Exch. Sav. Bank v. Brass*, (1901) 59 App. Div. 370, 69 N. Y. S. 391, affirmed without opinion (1902) 171 N. Y. 693, 64 N. E. 1118.

§ 176. When devise operates as an execution of the power. Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.

This section was derived from Real Property Law of 1896, § 156.

Certain devises to be deemed powers: see supra, § 97.

Execution of power to dispose by devise: see supra, § 167.

Power to bequeath personal property executed by general provision in will: see PERSONAL PROPERTY LAW, § 18.

Application to personal property.—The rule laid down by the section applies equally to personal property as well as to real estate. *Lockwood v. Mildeberger*, (1899) 159 N. Y. 181, 53 N. E. 803, reversing 5 App. Div. 459, 30 N. Y. S. 1107; *New York Life Ins., etc., Co. v. Livingston*, (1892) 133 N. Y. 125, 30 N. E. 724; *Hutton v. Benkard* (1883) 92 N. Y. 295; *Hirsch v. Bucki*, (1914) 162 App. Div. 659, 148 N. Y. S. 214; *Matter of Piffard*, (1886) 42 Hun 34, 3 N. Y. St. Rep. 434, affirmed (1888) 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193.

Execution of power of appointment.—By force of the section when a will purports to dispose of all the testator's property, it operates as an execution of a power of appointment, unless the intent that it shall not so operate appears expressly or by necessary implication. *Lockwood v. Mildeberger*, (1899) 159 N. Y. 181, 53 N. E. 803, reversing 5 App. Div. 459, 30 N. Y. S. 1107. See also *Hutton v. Benkard*, (1883) 92 N. Y. 295; *Thomas v. Snyder*, (1887) 43 Hun 14, 6 N. Y. St. Rep. 592. So, the language of a will is not necessarily affected by the provisions of the section, as it has been held that wills of a most general character are effective, as an execution of a power to pass property by will. *Kibler v. Miller*, (1890) 57 Hun 14, 10 N. Y. S. 375, affirmed without opinion (1894) 141 N. Y. 571, 36 N. E. 345; *Bolton v. De Peyster*, (1857) 25 Barb. 539. And it has been held that an attempted appointment is to be construed precisely as if it had been a devise or bequest of the donee's own property. *Austin v. Oakes*, (1890) 117 N. Y. 577, 23 N. E. 193, modifying 48 Hun 492, 1 N. Y. S. 307; *McLean v. McLean*, (1916) 174 App. Div. 152, 160 N. Y. S. 949.

Cited.—This section was cited in *Mott v. Ackerman*, (1883) 92 N. Y. 539.

§ 177. Disposition not void because too extensive. A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid.

This section was derived from Real Property Law of 1896, § 157.

Nominal conditions may be disregarded: see supra, § 171.

Effect of provision in excess of power.—The execution of a power will not be defeated because of some provision in the appointment made which is in excess of the power, when such provision may be eliminated without disturbing the general scheme; and a general and unlimited power of appointment to be exercised in the future is not void, because under it the donee may, without departing from the express language, attempt to create an illegal estate; the legal effect of the power is simply to authorize the donee to do what is lawful. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282; *McLean v. McLean*, (1916) 174 App. Div. 152,

160 N. Y. S. 949. See also *Austin v. Oakes*, (1890) 117 N. Y. 577, 23 N. E. 193, modifying 48 Hun 492, 1 N. Y. S. 307; *Root v. Stuyvesant*, (1837) 18 Wend. 257.

§ 178. Computation of term of suspension. The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the creation of the power.

This section was derived from Real Property Law of 1896, § 158.

Suspension of power of alienation: see *supra*, § 42.

Suspension of ownership of personal property: see PERSONAL PROPERTY LAW, § 11.

Application to personal property.—The rule laid down by the section applies equally to powers relating to personal property. *Matter of Pillsbury*, (1906) 113 App. Div. 893, 99 N. Y. S. 62, affirmed without opinion (1906) 186 N. Y. 545, 79 N. E. 1114.

Date of instrument as controlling.—It has been held that the rule laid down by the section makes it imperative to go back to the date of the instrument and determine if, computing from that date, there has been an illegal suspension of the absolute power of alienation for a longer period than during the continuance of not more than two lives in being. *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201, modifying and affirming 30 Hun 605; *Maitland v. Baldwin*, (1893) 70 Hun 267, 24 N. Y. S. 29. See also *Jackson v. Davenport*, (1822) 20 Johns. 537.

Suspension of ownership.—In applying the statutory rule as to the suspension of the absolute ownership, the provisions of a will which attempt to execute a power of appointment conferred by will must be tested by reading them into the will which created the power, and an attempt, by a will which undertakes to execute a power of appointment conferred by will, to postpone the absolute ownership of property covered by the power of appointment, by lives which were not in being at the death of the maker of the will which created the power, violates the statute. *Fargo v. Squiers*, (1897) 154 N. Y. 250, 48 N. E. 509, modifying 6 App. Div. 485, 39 N. Y. S. 648. See also *Salmon v. Stuyvesant*, (1836) 16 Wend. 321. And a trust is created and the ownership of the property is not vested in the beneficiaries as of the date of the death of the maker of the will, but is suspended, where a will gives the property to the executors in trust, to care for and manage it, with extraordinary powers of sale and investment, not only during the infancy of certain beneficiaries, but until they attain a specified age beyond majority, and there is an uncertainty as to the persons who may ultimately take in possession. *Fargo v. Squiers*, (1897) 154 N. Y. 250, 48 N. E. 509, modifying 6 App. Div. 485, 39 N. Y. S. 648. But a perpetuity cannot be created by means of a power in trust any more than by a direct limitation. *Booth v. Baptist Church of Christ*, (1891) 126 N. Y. 215, 28 N. E. 238; *Everitt v. Everitt*, (1861) 29 N. Y. 39, reversing 29 Barb. 112; *Belmont v. O'Brien*, (1855) 12 N. Y. 394. As there is nothing peculiarly sacred about estates which are transmitted by means of powers, there is no sound reason why they should not be governed by the same rules which control the devolution of estates by other methods. *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092. See also *Matter of Stewart*, (1892) 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836.

Time within which power must be executed.—There is not to be found in that statute any restriction respecting the time within which a power must be executed, although it does provide a limitation of the period during which the absolute right of alienation may be suspended by an instrument in execution of a power. *Blanchard v. Blanchard*, (1875) 4 Hun 287, affirmed without opinion (1877) 70 N. Y. 615.

Limitation of power of appointment.—The principle that the validity of a limitation is to be tested by what is possible, and not by what in fact happens, has no application in reason to the construction of a power to limit

estates couched in general terms, without negative or restrictive words. It applies to estates actually limited under a will, deed or power, and a general and unlimited power of appointment to be exercised in the future is not void because under it the donee might, without departing from the express language, attempt to create an illegal estate. The power is in legal effect a power to do what is lawful and not what is unlawful. *Hillen v. Iselin*, (1895) 144 N. Y. 365, 39 N. E. 368, affirming 67 Hun 444, 22 N. Y. S. 282. See also *Genet v. Hunt*, (1889) 113 N. Y. 158, 21 N. E. 91; *Farmers' Loan, etc., Co. v. Shaw*, (1908) 127 App. Div. 656, 107 N. Y. S. 337, 111 N. Y. S. 1118. And it was undoubtedly the rule of the common law that under a general power, giving the donee the right to appoint at his pleasure, the period of suspension was computed from the time of the exercise of the power. This was because such a donee could appoint himself, and thus acquire an absolute power of disposition which was equivalent to actual ownership, and it is clear to the point of demonstration that it was intended that this broad general rule of the common law should be embodied in the statutes. *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092. So no estate or interest can be given or limited to any person by an instrument in execution of a power which such person would not have been capable of taking under the instrument by which the power was granted. *Dana v. Murray*, (1890) 122 N. Y. 604, 26 N. E. 21.

§ 179. Capacity to take under a power. An estate or interest can not be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.

This section was derived from Real Property Law of 1896, § 159.

Capacity to take and execute a power: see supra, § 141.

General rule applicable to powers.—"There is nothing peculiarly sacred about estates which are transmitted by means of powers, and there is no sound reason why they should not be governed by the same rules which control the devolution of estates by other methods." *Farmers' Loan, etc., Co. v. Kip*, (1908) 192 N. Y. 266, 85 N. E. 59, affirming 120 App. Div. 347, 104 N. Y. S. 1092. And the prohibition of the section has been held not to refer merely to estates void by reason of an illegal suspension of the power of alienation but to estates which may be lawfully created, but which the appointee of a power is incompetent to take by deed directly from the person creating or reserving the power. *Dempsey v. Tylee*, (1854) 3 Duer 73.

§ 180. Purchaser under defective execution. A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.

This section was derived from Real Property Law of 1896, § 160.

Power of equity to execute power.—In order to protect the rights of a purchaser under a defective execution of a power, equity will take upon itself the proper execution thereof. *Doscher v. Wyckoff*, (1908) 113 N. Y. S. 655. See also *Correll v. Lauterbach*, (1895) 14 Misc. 469, 36 N. Y. S. 615.

§ 181. Instrument affected by fraud. An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.

This section was derived from Real Property Law of 1896, § 161.

Conveyances with intent to defraud: see infra, §§ 262, 263.

Fraudulent execution of power.—A fraudulent execution of a power is void at law and in equity. *Harty v. Doyle*, (188) 49 Hun 410, 3 N. Y. S. 574.

Intent of parties.—It is the duty of the court to put itself, in giving construction to the instrument, as near as may be, in the situation of the parties, and view the surrounding circumstances, and bear in mind the occasion and apparent object of the parties. *Matter of Vandevort*, (1896) 8 App. Div. 341, 40 N. Y. S. 791.

Transactions between trustee and beneficiary.—A trustee or a donee of a power in trust cannot trade and bargain with a beneficiary with a view of deriving any advantage to himself by the transaction. The rule is inflexible, and neither upright intention nor the payment of a fair price will overcome the legal impediment, and a court of equity will set aside the transaction on the application of the beneficiary, without requiring him to establish that the trustee acted fraudulently or profited by the bargain. *Boerum v. Schenck*, (1869) 41 N. Y. 182; *Post v. Benchley*, (1888) 48 Hun 8, 15 N. Y. St. Rep. 618, appeal dismissed (1888) 110 N. Y. 665, 18 N. E. 480.

§ 182. **Sections applicable to trust powers.** Sections one hundred and eleven to one hundred and thirteen of this chapter, both inclusive, in relation to express trust estates, and the trustee thereof, apply equally to trust powers, however created, and to the grantees of such powers.

This section was derived from Real Property Law of 1896, § 162.

Cited.—This section was cited in *Cooke v. Platt*, (1885) 98 N. Y. 35; *Delaney v. McCormack*, (1882) 88 N. Y. 174; *Matter of Clark*, (1891) 62 Hun 275, 17 N. Y. S. 93; *Quin v. Skinner*, (1867) 49 Barb. 128, reversed (1870) 43 N. Y. 99; *Leggett v. Hunter*, (1857) 25 Barb. 81, affirmed (1859) 19 N. Y. 445.

ARTICLE 6*

DOWER

Section 190. Dower.

191. Dower in lands exchanged.
192. Dower in lands mortgaged before marriage.
193. Dower in lands mortgaged for purchase-money.
194. Surplus proceeds of sale under purchase-money mortgages.
195. Widow of mortgagee not endowed.
196. When dower barred by misconduct.
197. When dower barred by jointure.
198. When dower barred by pecuniary provisions.
199. When widow to elect between jointure and dower.
200. Election between devise and dower.
201. When deemed to have elected.
202. When provision in lieu of dower is forfeited.
203. Effect of acts of husband.
204. Widow's quarantine.
205. Widow may bequeath a crop.
206. Divorced woman may release dower.
207. Married woman may release dower by attorney.

§ 190. Dower. A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage.

This section was derived from Real Property Law of 1896, § 170.

Section 190 of the Real Property Law of 1896 is now covered by section 220.

Action for dower generally: see Code Civ. Pro., § 1596 et seq.

Jurisdiction of county court in action for dower: see Code Civ. Pro., § 340.

Jury trial in action for dower: see Code Civ. Pro., § 968.

Place of trial: see Code Civ. Pro., § 982.

Sale of dower interest of infant, lunatic, idiot or habitual drunkard: see Code Civ. Pro., §§ 2350, 2363.

Sale of dower interest in action for partition: see Code Civ. Pro., §§ 1567, 1568.

Maintenance of action to determine dower in action for determination of claim to real property: see Code Civ. Pro., § 1647.

Maintenance of action of ejectment where action for dower may be maintained: see Code Civ. Pro., § 1499.

Additional parties bound in action for dower: see Code Civ. Pro., § 1671a.

Right of common law wife: see Ann. Cas. 1912A 78 note.

Rights of putative wife: see Ann. Cas. 1913A 240.

Property subject to dower: see notes, 21 Ann. Cas. 481; Ann. Cas. 1912A 410; Ann. Cas. 1912D 779; Ann. Cas. 1913A 629; Ann. Cas. 1913B 1310; 22 L. R. A. (N. S.) 691; 29 L. R. A. (N. S.) 726; 32 L. R. A. (N. S.) 103.

Mineral rights of tenant in dower: see 36 L. R. A. (N. S.) 1099 note.

Forfeiture of husband's estate for treason as affecting dower: see L. R. A. 1916E 346 note.

Basis of right to dower.—The basis of the right to dower, which our statute confers upon the wife, is in the common law of England, as given and

* This article was article 5 of the Real Property Law of 1896.

regulated by English statutes. Those in force at the time of the adoption of our first Constitution, in 1777, were re-enacted in various revisions of our laws, until their substance was embodied in the Revised Statutes in 1829. *Van Blaricum v. Larson*, (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219, affirming 146 App. Div. 278, 130 N. Y. S. 925. See also *House v. Jackson*, (1872) 50 N. Y. 161; *Bryon v. Bryon*, (1909) 134 App. Div. 320, 119 N. Y. S. 41. And the right of dower is not derived from the husband. It is a right at common law, and arises by reason of the marriage and by operation of law. It is a right which attaches on the land when the seizin and the marriage relation are concurrent. *Kurscheedt v. Union Dime Sav. Inst.*, (1890) 118 N. Y. 358, 23 N. E. 473, 7 L. R. A. 229; *Campbell v. Ellwanger*, (1894) 81 Hun 259, 30 N. Y. S. 792; *Elwood v. Klock*, (1852) 13 Barb. 50; *Scott v. Howard*, (1848) 3 Barb. 319.

"Whereof her husband was seized."—It is not necessary that the husband be seized in fact, as seizin in law, which is the right to possession, is sufficient. *Lugar v. Lugar*, (1914) 160 App. Div. 807, 146 N. Y. S. 37; *McIntyre v. Costello*, (1888) 47 Hun 289, 14 N. Y. St. Rep. 370; *Gibbs v. Esty*, (1880) 22 Hun 266; *Poor v. Horton*, (1853) 15 Barb. 485; *Jackson v. Waltermire*, (1827) 7 Cow. 353; *Embree v. Ellis*, (1807) 2 Johns. 119. And to entitle the wife to dower the husband must be seized either in fact or in law of a present freehold in the premises, as well as of an estate of inheritance. *Phelps v. Phelps*, (1894) 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625; *Purdy v. Purdy*, (1916) 95 Misc. 369, 158 N. Y. S. 683; *Nichols v. Park*, (1903) 78 App. Div. 95, 79 N. Y. S. 547. But it has been held that where the husband has only an instantaneous seizin of land as where he takes a conveyance thereof and gives back a mortgage for the purchase money, the wife is not entitled to dower therein. *Cunningham v. Knight*, (1847) 1 Barb. 399.

Effect of devise to widow of life estate.—Where a testator devises the use of his residence to his widow for life the devise is not in lieu of dower, and the widow is not put to an election, but is entitled to both the life estate and dower. Such dower is not cut off because a devise of other lands in trust with power of sale cannot be carried out without denying the widow dower therein. *Springsteen v. Springsteen*, (1916) 172 App. Div. 605, 158 N. Y. S. 848.

"Estate of inheritance."—The term "estate of inheritance," in which a wife takes dower, includes any equitable interest owned by the husband and not extinguished by his death. *Lugar v. Lugar*, (1914) 160 App. Div. 807, 146 N. Y. S. 37. See also *Mullin v. Mullin*, (1907) 119 App. Div. 521, 104 N. Y. S. 323.

Determination of dower right.—A wife's right to dower must be determined by the laws of the state in which the lands are situated. *Van Blaricum v. Larson*, (1911) 146 App. Div. 278, 130 N. Y. S. 925, affirmed (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219.

Nature of inchoate dower right.—The settled theory of the law as to the nature of inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract, but as an institution of law, constituting a mere chose in action incapable of transfer by grant or conveyance, but susceptible only during its inchoate state of extinguishment. By force of the statute this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest and not as a conveyance, and removes an incumbrance instead of transferring an interest or estate. *Witthaus v. Schack*, (1887) 105 N. Y. 332, 11 N. E. 649, reversing 38 Hun 560. And the inchoate right of dower is a valuable, subsisting, separate and distinct interest which is entitled to protection, and for which the wife may maintain a separate action. *Clifford v. Kampfe*, (1895) 147 N. Y. 383, 42 N. E. 1, affirming 84 Hun 393, 32 N. Y. S. 352; *Mutual Life Ins. Co. v. Shipman*, (1890) 119 N. Y. 324, 24 N. E. 177, reversing 50 Hun 578, 3 N. Y. S. 684; *Simar v. Canaday*, (1873) 53 N. Y. 298, 13 Am. Rep. 523; *Taggart v. Rogers*, (1888) 49 Hun 265, 1 N. Y. S. 900. Thus, courts have always been tender of the right of dower, and solicitous to protect it. Coke said "that three things be favored in law—life, liberty and dower." *Fern v. Osterhout*, (1896) 11 App. Div. 319, 42 N. Y. S. 450.

Release of inchoate dower right.—A wife's inchoate right of dower is incapable of being transferred or released by her during coverture, except to one who already had, or who by the same instrument received, an independent interest in the estate. *Marvin v. Smith*, (1871) 46 N. Y. 571, affirming 56 Barb. 600. See also *Mutual Life Ins. Co. v. Shipman*, (1890) 119 N. Y. 324, 24 N. E. 177, reversing 50 Hun 578, 3 N. Y. S. 684.

Dower as subject to debts.—The dower interest which a widow has in lands of which her deceased husband had been seized is, although unmeasured, liable in equity for her debts. *Payne v. Becker*, (1881) 87 N. Y. 153, reversing 22 Hun 28. On the other hand, it has been held that the right of a widow to dower, until it is assigned, is a mere chose in action which is not the subject of a sale upon execution at law, and before assignment or admeasurement is only a claim. *Aikman v. Harsell*, (1885) 98 N. Y. 186, affirming 31 Hun 634; *Moore v. New York*, (1853) 8 N. Y. 110, 59 Am. Dec. 473, affirming 4 Sandf. 456; *Lawrence v. Miller*, (1849) 2 N. Y. 245, reversing 1 Sandf. 516. And the sections of the statute relating to the admeasurement of dower indicate a clear intention of the legislature that, as between the widow and the heir or devisee, the widow's right of dower shall be enforced unburdened, if possible, except from the time an assignment of the dower shall have been made. *Harrison v. Peck*, (1870) 56 Barb. 251.

Release of vested dower right.—A widow's dower right, although not admeasured, is an absolute right, which is assignable. *Pope v. Mead*, (1885) 99 N. Y. 201, 1 N. E. 671; *Payne v. Becker*, (1881) 87 N. Y. 153, reversing 22 Hun 28. But to constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention. *Aikman v. Harsell*, (1885) 98 N. Y. 186, affirming 31 Hun 634. And the cases uniformly hold that a widow cannot be deprived of her dower right without her consent. *Meixel v. Meixel*, (1914) 161 App. Div. 518, 146 N. Y. S. 587; *Van Gelder v. Post*, (1836) 2 Edw. Ch. 576.

Computation of value of lands.—Dower must be computed upon the value of lands at the date of the husband's death or his alienation of the property, and the widow does not share in the value of improvements thereafter made. Hence where, after the husband's death, persons by mistake built a house upon vacant lands formerly owned by him, it was held that the widow was not entitled to a temporary injunction restraining the removal of the building pending an action to admeasure her dower, as she had no interest in the increased value so caused. *Emrich v. Emrich*, (1908) 129 App. Div. 557, 113 N. Y. S. 1052. And a widow is entitled to dower in lands aliened by the husband during the coverture, to one-third of the value of the lands at the time of alienation. *Shaw v. White*, (1816) 13 Johns. 179. But the sufficiency of land remaining of a husband's estate to satisfy all claim of dower is no answer to an action for dower out of the land of the husband's alienee. *Richardson v. Harms*, (1895) 11 Misc. 254, 32 N. Y. S. 808.

Lands not conveyed to husband.—To entitle a wife to dower the husband must be seized either in fact or in law of a present freehold in the premises as well as an estate of inheritance, and such a seizin cannot be predicated with respect to lands purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him. *Phelps v. Phelps*, (1894) 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625.

Dower of wife of grantee under quitclaim deed.—Where the husband holds title under a quitclaim deed his wife is entitled to dower the same as if he held under a full covenant warranty deed. *Finn v. Sleight*, (1850) 8 Barb. 401.

Dower in mines.—It has been held that mines, opened and worked during coverture, were subject to dower, but dower did not attach to mines unopened at the death of the husband. *Coates v. Cheever*, (1823) 1 Cow. 460.

Dower in right to use surplus canal waters.—It has been held that there can be no dower in the right and privilege of taking and using, for hydraulic purposes, a portion of the surplus waters of the Erie canal, under a grant from the canal commissioners. *Kingman v. Sparrow*, (1851) 12 Barb. 201.

Dower in life estate.—It has been held that dower cannot be had in a husband's estate per autre vie. *Gillis v. Broun*, (1826) 5 Cow. 388.

Dower in husband's remainder.—A widow is not dowerable of land in which her husband had only a vested remainder, expectant upon an estate for life. *Durando v. Durando*, (1861) 23 N. Y. 331. See also *House v. Jackson*, (1872) 50 N. Y. 161; *Bowne v. Colt*, (1916) 171 App. Div. 409, 157 N. Y. S.

417; *Matter of Peters*, (1902) 69 App. Div. 465, 74 N. Y. S. 1028; *Barr v. Howell*, (1914) 85 Misc. 330, 147 N. Y. S. 483; *Clark v. Clark*, (1895) 84 Hun 362, 32 N. Y. S. 325, affirmed (1895) 147 N. Y. 639, 42 N. E. 275; *Green v. Putnam*, (1847) 1 Barb. 500; *Gillis v. Broun*, (1826) 5 Cow. 388.

Effect of oral agreement by husband to give mortgage.—An oral agreement by a husband, to which his wife is not a party, to give "a proper and sufficient mortgage" upon property in which he owns a half interest to secure the payment of moneys advanced for the payment of taxes, water charges, and insurance, has no effect upon the wife's dower rights. *Meixel v. Meixel*, (1914) 161 App. Div. 518, 146 N. Y. S. 587.

Dower in partnership real estate.—Partnership real estate is primarily liable for firm debts and will be so applied before the widow of a partner can obtain any dower interest therein. *Riddell v. Riddell*, (1895) 85 Hun 482, 33 N. Y. S. 99.

Dower in equity of redemption.—The equity of redemption is a real and beneficial estate, descendible by inheritance, devisable by will, and alienable by deed, in all respects as if it were an absolute estate of inheritance at law, and the mortgagor is regarded as seized before foreclosure and entry, so as to entitle the widow to her dower. *Denton v. Nanny*, (1850) 8 Barb. 618; *Cooper v. Whitney*, (1842) 3 Hill 95.

Dower in husband's trust estate.—It has been held that a widow was not dowerable of a mere trust estate of her husband. *Cooper v. Whitney*, (1842) 3 Hill 95.

When dower defeated by husband's conveyance before marriage.—Where an owner of land conveyed to his sons, they actually paying the consideration of one dollar, and he in their presence handed the deeds to an attorney requesting him to hold them during the grantor's life, at his death to record and deliver them to the grantees, the grantor during his life to receive the rents and profits, and he subsequently married, thereafter died, and thereupon the attorney recorded the deeds and delivered them to the grantees, it was held that the title passed to the sons when the grantor delivered the deeds, in their behalf, to the attorney, and that therefore when the widow subsequently married the grantor there was in him no estate to which dower could attach. *Yutte v. Yutte*, (1902) 39 Misc. 272, 79 N. Y. S. 492.

Priority of legacies to widow in lieu of dower.—Where the personal estate remaining for distribution is insufficient to pay legacies in full, legacies to a widow in lieu of dower are entitled to priority and carry interest from the death of testator, although their value exceeds that of the dower interest. *Matter of McKay*, (1892) 5 Misc. 123, 25 N. Y. S. 725.

Reservation of perpetual rent.—Where a reservation of perpetual rent was defeasible upon the payment of a fixed sum it was held that such payment defeated a right of dower in the lands so conveyed. *Moriarta v. McRea*, (1887) 45 Hun 564, 10 N. Y. St. Rep. 631, affirmed without opinion (1890) 120 N. Y. 659, 24 N. E. 1103. See also *Greene v. Reynolds*, (1893) 72 Hun 565, 25 N. Y. S. 625.

Dower in proceeds of property taken by eminent domain.—Where lands are taken for public use, under the power of eminent domain, upon payment of their value to the owner of the fee, the public acquires an absolute title, divested of the wife's inchoate right of dower. *Moore v. New York*, (1853) 8 N. Y. 110, 59 Am. Dec. 473, affirming 4 Sandf. 456; *Matter of Brooklyn Bridge*, (1894) 75 Hun 558, 27 N. Y. S. 597, affirmed without opinion (1894) 143 N. Y. 640, 37 N. E. 823, 60 N. Y. St. Rep. 874.

Dower in pier.—A pier erected under and in pursuance of a statute and by the permission of the city, constituting a right to use and maintain the pier in perpetuity, upon land under water belonging to the state, for the use of and attached to a wharf on the upland appurtenant to the fee of the adjacent street, in the original city of New York, was held to be real property and therefore subject to the dower right of the widow of the owner of the fee of the street and wharf to which the pier was attached. *Bedlow v. Stillwell*, (1899) 158 N. Y. 292, 53 N. E. 26, affirming 91 Hun 384, 36 N. Y. S. 129.

Priority of annuity over dower.—Where a son of a testator obtained a part of the testator's realty by conveyances made between the devisees and the annuitant, by which such part was subjected to the lien of the annuity on the passage of the title to him, the right of dower of his wife as to such part of the estate is subordinate to the lien of the annuity. *Clark v. Clark*, (1895) 147 N. Y. 639, 42 N. E. 275, affirming 84 Hun 362, 32 N. Y. S. 325.

Priority of dower over annuity.—In a case where an annuity, by reason of there being sufficient personal property at the death of the testator to furnish it, did not become a charge upon the land by force of the original devise, the right of dower of the wife of a son of the testator in the shares in the realty taken by him through the devise will have a priority over the right of the annuitant, which will not be affected by an arrangement made between the annuitant and the devisees after the right of dower attached, making the annuity a charge upon the land. *Clark v. Clark*, (1895) 147 N. Y. 639, 42 N. E. 275, affirming 84 Hun 362, 32 N. Y. S. 325.

Effect of wife joining in fraudulent deed.—In *Wilkinson v. Paddock*, (1890) 57 Hun 191, 11 N. Y. S. 442, affirmed without opinion (1891) 125 N. Y. 748, 27 N. E. 407, a conveyance by a husband in fraud of his creditors was set aside and his wife's dower right was restored to her, although she had united with him in the deed.

Forged deed.—The inchoate right of dower possessed by a wife in the lifetime of her husband is such an interest in his real estate as entitled her to maintain an action in equity to cancel of record, so far as she is concerned, a deed of her husband purporting to be executed also by his wife, on the ground that so far as the deed purports to be signed by her it is a forgery. *Clifford v. Kampfe*, (1895) 147 N. Y. 383, 42 N. E. 1, affirming 84 Hun 393, 32 N. Y. S. 352.

Cited.—This section was cited in *Green v. Lampman*, (1916) 95 Misc. 723, 160 N. Y. S. 905; *Matter of Campbelle*, (1914) 87 Misc. 83, 150 N. Y. S. 416.

§ 191. Dower in lands exchanged. If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

This section was derived from Real Property Law of 1896, § 171.

Section 191 of the Real Property Law of 1896 is now covered by section 221.

Meaning of term "exchange."—The term "exchange," as used in the section, is to receive the same interpretation applied to it at common law, and in order to deprive a wife of her dower in lands conveyed by her husband, or to put her to an election, there must be a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other. *Wilcox v. Randall*, (1850) 7 Barb. 623.

Cited.—This section was cited in *Runyan v. Stewart*, (1850) 12 Barb. 537.

§ 192. Dower in lands mortgaged before marriage. Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

This section was derived from Real Property Law of 1896, § 172.

Section 192 of the Real Property Law of 1896 is now covered by section 222.

Dower in property conveyed before marriage: see 48 L. R. A. (N. S.) 512 note.

Application of section to purchase money mortgage.—The provisions of this section have been held not to apply to the case of a mortgage for the purchase money. *Cunningham v. Knight*, (1847) 1 Barb. 399. See *infra*, § 193.

Effect of wife joining in mortgage with husband.—A wife who executes a mortgage jointly with her husband is entitled to dower in the equity of

redemption of which her husband is seized, notwithstanding the mortgage, and which right is not affected unless she is made a party to the foreclosure. *Simar v. Canaday*, (1873) 53 N. Y. 298, 13 Am. Rep. 523; *Mills v. Van Voorhies*, (1859) 20 N. Y. 412, reversing 23 Barb. 125. See also *Bell v. Mayor*, (1843) 10 Paige 49; *Coates v. Cheever*, (1823) 1 Cow. 460; *Van Dyne v. Thayer*, (1838) 19 Wend. 162; *Cooper v. Whitney*, (1842) 3 Hill 95. And a widow is entitled to dower in an equity of redemption, as well when the mortgage was executed before marriage, as when it was executed by the husband and wife during coverture. *Denton v. Nanny*, (1850) 8 Barb. 618.

§ 193. Dower in lands mortgaged for purchase-money. Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

This section was derived from Real Property Law of 1896, § 173.

Section 193 of the Real Property Law of 1896 is now covered by section 223.

Preference of mortgage for purchase money over judgment: see Code Civ. Pro., § 1254.

Effect of sale under foreclosure by advertisement: see Code Civ. Pro., § 2395, subd. 5.

Priority as between purchase money mortgage and dower: see notes, Ann. Cas. 1916C 946; 52 L. R. A. (N. S.) 540.

Mortgage to secure money advanced to purchase property as purchase money mortgage: see 40 L. R. A. (N. S.) 275 note.

Vendor's lien: see 52 L. R. A. (N. S.) 555 note.

Former rule.—It was formerly held that where a husband purchased land and gave back a purchase-money mortgage, his seizing of the land was but instantaneous, and his wife was not entitled to dower therein. *Stow v. Tift*, (1818) 15 Johns. 458, 8 Am. Dec. 266. See also *Jackson v. Dewitt*, (1826) 6 Cow. 316.

Present rule.—Except as against the mortgagee and those claiming under him, the wife has her dower right in the mortgaged lands, although she is not a party thereto. *Brackett v. Baum*, (1872) 50 N. Y. S. See also *Boies v. Benham*, (1891) 127 N. Y. 620, 28 N. E. 657, 14 L. R. A. 55, affirming 53 Hun 236, 6 N. Y. S. 721; *Sheldon v. Hoffnagle*, (1889) 51 Hun 478, 4 N. Y. S. 287; *Williams v. Kinney*, (1887) 43 Hun 1, 6 N. Y. St. Rep. affirmed (1890) 118 N. Y. 679 mem. The only dower interest which the widow obtains in lands mortgaged for purchase money is in the equity of redemption. *Underground Electric Rys. Co. v. Owsley*, (1912) 196 Fed. 278, 116 C. C. A. 98, 40 L. R. A. (N. S.) 609. But a purchase-money mortgage is only a purchase-money mortgage to the extent of one-third of the premises in question (see *infra*, § 194). *Fern v. Osterhout*, (1896) 11 App. Div. 319, 42 N. Y. S. 450.

Failure to take mortgage for purchase money.—Where a grantor took no mortgage in payment of the purchase money, it was held that he had an equitable lien upon the land, and the widow of the grantee took her dower subject to such equitable lien for the unpaid purchase money. *Warner v. Van Alstyne*, (1832) 3 Paige 513.

Effect of recital as to character of mortgage.—Where a mortgage recited that it was a purchase-money mortgage, and it appeared that it was not in fact such a mortgage, it was held that the wife's dower right was not affected by the recital. *Taylor v. Post*, (1883) 30 Hun 446.

Status of assignee.—An assignee takes the mortgage, not only subject to all the equities existing between the parties to the mortgage, but to the equities which third persons can enforce against the mortgagor. *Owen v. Evans*, (1892) 134 N. Y. 514, 31 N. E. 999; *Hill v. Hoole*, (1889) 116 N. Y. 299, 22 N. E. 547, 5 L. R. A. 620; *Greene v. Warnick*, (1876) 64 N. Y. 220, reversing 4 Hun 703; *Dodge v. Manning*, (1897) 19 App. Div. 29, 46

N. Y. S. 1049. See also *Blydenburgh v. Northrop*, (1856) 13 How. Pr. 289. And a mortgage given by husband and wife to secure the purchase money of the mortgaged premises cannot, after having been satisfied and discharged of record, be set up by the assignee of the husband as a bar to his widow's right of dower. *Runyan v. Stewart*, (1850) 12 Barb. 537. See also *De Lisle v. Herbs*, (1881) 25 Hun 485.

Amounts paid for taxes.—It has been held that amounts paid for taxes secured by a purchase-money mortgage were paramount to dower. "The statute says, in effect, that a purchase-money mortgage takes precedence of dower and we perceive no ground upon which a distinction can be drawn between the demand for the purchase money itself which is secured by the mortgage and the demand for the incident thereto—the amount paid for taxes to protect the mortgage debt—which was likewise secured by the mortgage." *Underground Electric Rys. Co. v. Owsley*, (1912) 196 Fed. 278, 116 C. C. A. 98, 40 L. R. A. (N. S.) 609.

§ 194. Surplus proceeds of sale under purchase-money mortgages. Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

This section was derived from Real Property Law of 1896, § 174.

Section 194 of the Real Property Law of 1896 is now covered by section 224. **Foreclosure as proper proceeding to determine right of dower.**—It has been held that an action of foreclosure is not a proper proceeding in which to determine the right of dower, and that a judgment in such an action, wherein the widow is made a party, and in the complaint in which no specific allegations are made as to her dower, does not bar her right thereto; and in a proceeding wherein it is not proper to determine the right of dower, and wherein the complaint does not in more specific terms set forth that such right of dower is to be brought in question, and wherein the doweress does not appear and litigate her rights, and thereby consent to the regularity of the proceedings, she cannot be foreclosed of her rights. *Fern v. Osterhout*, (1896) 11 App. Div. 319, 42 N. Y. S. 450; *Nelson v. Brown*, (1895) 144 N. Y. 384, 39 N. E. 353, affirming 66 Hun 311, 20 N. Y. S. 978; *Merchants' Bank v. Thomson*, (1873) 55 N. Y. 7.

Effect of power of sale.—Where the mortgage contains a power of sale, the effect of the section is to make the power as well as the lien of the mortgage paramount to the right of the wife, to the same extent as if reserved by the vendor out of the estate granted to the husband; and a purchaser under such a power would seem to be protected by the very terms of the statute, against any claim of the wife for dower. Her interest can only attach to the surplus produced by the sale. The statute provides for her dower right in this surplus, when the sale is made after the death of the husband; thus assuming that her right of dower in the land is cut off by the sale under the power. But no provision is made for the case of a sale in the lifetime of the husband. *Brackett v. Baum*, (1872) 50 N. Y. 8. But it has been held that where a wife joined with a husband in a mortgage of his lands and he died after sale in foreclosure and after confirmation of the report of such sale, she was not entitled to any amount by way of dower out of any balance of the avails of the sale. *Frost v. Peacock*, (1846) 4 Edw. 678.

Dower in equity of redemption after foreclosure.—The wife of a mortgagor of land for the purchase money, whether she has or has not joined in the mortgage, has an inchoate right of dower in the equity of redemption which

is not affected by a foreclosure to which she is not a party, and the object of the statute is not to prescribe a different rule, but to prevent the claim of dower of a widow who did not unite in a purchase-money mortgage from having preference to it. *Mills v. Van Voorhies*, (1859) 20 N. Y. 412, reversing 23 Barb. 125. See also *Brackett v. Baum*, (1872) 50 N. Y. 8; *Campbell v. Ellwanger*, (1894) 81 Hun 259, 30 N. Y. S. 792; *Greene v. Reynolds*, (1893) 72 Hun 565, 25 N. Y. S. 625; *Taggart v. Rogers*, (1888) 49 Hun 265, 1 N. Y. S. 900; *Coates v. Cheever*, (1823) 1 Cow. 460; *Matthews v. Duryee*, (1865) 45 Barb. 69, affirmed 4 Keyes 525, 3 Abb. App. Dec. 220; *Smith v. Gardner*, (1864) 42 Barb. 356. Thus in *Simar v. Canaday*, (1873) 53 N. Y. 298, 13 Am. Rep. 523, it was said by Folger, J.: "A wife who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption of which her husband is seized, notwithstanding the mortgage, which right is not affected in equity unless she is made a party to the foreclosure. If omitted, she can come in at any time and redeem, not withstanding a decree and sale in the foreclosure suit." And a widow is entitled to dower in an equity of redemption as well when the mortgage was executed before marriage, as when it was executed by husband and wife during coverture. *Denton v. Nanny*, (1850) 8 Barb. 618.

Mortgage payable by installments.—A wife joining with her husband in a mortgage is, after his death, entitled to the rents and profits of her dower, or other interests in the premises, until foreclosure; and where the debt is payable by installments, and the amount which has become due can be satisfied by a sale of one parcel only of the premises, the income of her share of the residue cannot be taken to satisfy that part of the debt which is not yet due. *Ogdensburgh Bank v. Arnold*, (1835) 5 Paige 38.

Protection against husband's creditors.—A wife's inchoate right of dower in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her, with her husband, and will be protected against the claims of the husband's creditors, by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors during the joint lives of husband and wife. *Vartie v. Underwood*, (1854) 18 Barb. 561.

Payment of surplus to divorced husband.—Where a husband and wife had been separated by a judgment of the court in favor of the latter, who was dependent upon alimony awarded her by the judgment, and one-third of the surplus on foreclosure had been deposited in court for her benefit, it was held that the husband was not entitled to such money upon his execution of a bond conditioned upon payment to her of the income during her life. *Emigrant Industrial Sav. Bank v. Regan*, (1899) 41 App. Div. 523, 58 N. Y. S. 693.

"And any surplus remains."—Where a wife joins her husband in a mortgage of his real estate, she is not entitled to have the mortgage satisfied out of the husband's interest in the premises exclusively, so as to give her dower in the whole premises notwithstanding the mortgage, and not in the equity of redemption merely; and thus, where the mortgaged premises are sold under the mortgage, the wife is only entitled to be endowed of the surplus which remains after payment of the mortgage debt and costs of foreclosure. *Hawley v. Bradford*, (1841) 9 Paige 200.

§ 195. Widow of mortgagee not endowed. A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

This section was derived from Real Property Law of 1896, § 175.

Section 195 of the Real Property Law of 1896 is now covered by section 225.

Extent of mortgagee's interest.—The interest of a mortgagee is extinguished by payment, or by whatever extinguishes the debt, and is not subject to dower or curtesy. *Kortright v. Cady*, (1860) 21 N. Y. 343, 78 Am. Dec. 145, reversing 23 Barb. 490.

§ 196. When dower barred by misconduct. In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

This section was derived from Real Property Law of 1896, § 176.

Section 196 of the Real Property Law of 1896 is now covered by section 226.

Marriages generally: see DOMESTIC RELATIONS LAW, art. 2.

Effect of judgment dissolving marriage for wife's misconduct: see Code Civ. Pro., § 1760, subd. 3.

Divorce generally as barring dower: see notes, Ann. Cas. 1914B 665; 11 L. R. A. 790.

Misconduct generally: see 3 L. R. A. (N. S.) 971 note.

Adulterous cohabitation: see 11 L. R. A. 791 note.

Fraud: see 25 L. R. A. 573.

"Misconduct" of the wife.—The "misconduct" which deprives a wife of her dower is her adultery. *Van Cleef v. Burns*, (1892) 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542, reversing 62 Hun 250, 16 N. Y. S. 667; *Price v. Price*, (1891) 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 350, reversing 33 Hun 76; *Van Cleef v. Burns*, (1890) 118 N. Y. 549, 23 N. E. 881, 16 A. S. R. 782, reversing 43 Hun 461, 6 N. Y. St. Rep. 721. See also *Van Blaricum v. Larson*, (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219, affirming 146 App. Div. 278, 130 N. Y. S. 925. And where a marriage had been annulled by judicial decree, upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, and although both parties entered into the marriage in entire good faith, it was held that the wife by the second marriage was not entitled to dower in the real estate owned by the husband at the date of the decree. *Price v. Price*, (1891) 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359, reversing 33 Hun 76.

As to effect of adultery without divorce, see 5 Ann. Cas. 230 note.

Necessity of judgment of divorce.—It is only where, upon proof and a finding or verdict of adultery, the court has given judgment of divorce against the wife and dissolved the marriage contract that her right of dower is lost; the forfeiture is not a consequence of the offense, but of the judgment founded thereon. *Schiffer v. Pruden*, (1876) 64 N. Y. 47, affirming 39 Super. Ct. 167. See also *Schiffer v. Dietz*, (1881) 83 N. Y. 300; *Bryon v. Bryon*, (1909) 134 App. Div. 320, 119 N. Y. S. 41; *Reynolds v. Reynolds*, (1840) 24 Wend. 193; *Cooper v. Whitney*, (1842) 3 Hill 95; *Forrest v. Forrest*, (1859) 3 Bosw. 661; *Kade v. Lauber*, (1875) 16 Abb. Pr. (N. S.) 288. And an admission or proof of adultery, or a verdict or judgment in any other action will not work a forfeiture of a wife's dower. *Pitts v. Pitts*, (1873) 52 N. Y. 593.

Effect of interlocutory decree of divorce.—Although an interlocutory decree of divorce has been entered against a wife, she is entitled to dower, as nothing short of a final decree divorces the parties and deprives the wife of her right. Thus the death of the husband prior to the entry of the final decree does not deprive the wife of her dower. *Bryon v. Bryon*, (1909) 134 App. Div. 320, 119 N. Y. S. 41.

Divorce on ground of husband's adultery.—A divorce dissolving a marriage contract on the ground of the husband's adultery does not deprive the wife of her right of dower in his real estate. *Wait v. Wait*, (1850) 4 N. Y. 95, reversing 4 Barb. 192; *Van Blaricum v. Larson*, (1911) 146 App. Div. 278, 130 N. Y. S. 925, affirmed (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219.

Effect of divorce granted in another state.—The effect which a judgment of divorce granted in another state has upon the husband's lands in this state must be determined, not by its laws, but by the laws of this state. Thus where a husband obtained a decree of divorce in another state upon ground of his wife's abandonment, it was held that she was not thereby deprived of her dower in the lands of her husband in this state; although the effect of the decree under the statutes of the state wherein it was rendered, was to deprive her of her dower. *Van Cleef v. Burns*, (1892) 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542, reversing 62 Hun 250, 16 N. Y. S. 667. See

also *Van Blaricum v. Larson*, (1911) 146 App. Div. 278, 130 N. Y. S. 925, affirmed (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219. And see generally notes, Ann. Cas. 1913E 555; 15 L. R. A. 542; 59 L. R. A. 181; 41 L. R. A. (N. S.) 219.

Necessity of personal service or appearance.—A judgment of divorce rendered in another state against a resident of this state, where there has been no personal service of process within the state rendering it, and no personal appearance by the defendant, is inoperative and void in this state. *Williams v. Williams*, (1891) 130 N. Y. 193, 29 N. E. 98, 27 A. S. R. 517, 14 L. R. A. 220.

When absolute divorce obtained by wife in another state does not bar dower.—An absolute divorce obtained by the wife in another state for a cause not recognized as ground for absolute divorce in this state, does not release and bar her claim to dower in property in this state owned by the husband during the marriage, although after-acquired lands are not subject thereto. *Van Blaricum v. Larson*, (1912) 205 N. Y. 355, 98 N. E. 488, Ann. Cas. 1913E 553, 41 L. R. A. (N. S.) 219, affirming 146 App. Div. 278, 130 N. Y. S. 925.

§ 197. **When dower barred by jointure.** Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

This section was derived from Real Property Law of 1896, § 177.

Section 197 of the Real Property Law of 1896 is now covered by section 227.

Methods of jointure.—The word jointure has been so extended by the statutes as to include a sole estate limited to the wife alone or a pecuniary provision in lieu of dower, and there are two sorts of jointures created by the statutes of this state: (1.) By an antenuptial agreement executed by both parties, which prevents the right to dower from ever rising. (2.) A jointure created before marriage but not assented to by the betrothed wife, or created after marriage, which, when accepted in lieu of dower, bars it, but not before. *Graham v. Graham*, (1893) 67 Hun 329, 22 N. Y. S. 299, affirmed (1894) 143 N. Y. 573, 38 N. E. 722. And an ante-nuptial agreement, that the intended wife shall exclusively enjoy property held by her as widow and administratrix of her former husband, and which is not expressed to be in lieu of dower, is no bar to her claim for dower in the estate of her second husband. *Swaine v. Perine*, (1821) 5 Johns. Ch. 482. But an inchoate right of dower is not an estate or interest in land and cannot be extinguished by merger or in any way, except by the death or by the conveyance of the wife. *Huff v. Wheeler*, (1899) 27 Misc. 763, 59 N. Y. S. 716.

Effect of jointure. The act of the wife in joining her husband in the execution of a deed of his lands, does not constitute her a grantor of the premises, or vest in the grantee any greater or other estate than such as he derives from the conveyances of the husband. Its effect is merely to extinguish a contingent claim existing as a possible incumbrance, and ceasing to exist by reason of the execution of the husband's deed, and to be revived only by the subsequent cancellation or annulment of his conveyance. *Witthaus v. Schack*, (1887) 105 N. Y. 332, 11 N. E. 649, reversing 38 Hun 560. And the joinder by a married woman with her husband in a deed or mortgage of his lands does not operate, as to her, by way of passing an estate, but inures simply as a release to the grantee of the husband, of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from:

the husband and excludes her from afterwards claiming dower in the premises as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance. *Hinchliffe v. Shea*, (1886) 103 N. Y. 153, 8 N. E. 477, reversing 34 Hun 365.

Distinction between legal and equitable jointures.—The distinction between legal and equitable jointures is abolished; and any estate or pecuniary provision made for the benefit of the wife, whether an adult or an infant, in lieu of dower, will if assented to by her in the manner prescribed by statute, constitute a legal bar of her dower. *McCartee v. Teller*, (1831) 2 Paige 511, affirmed 8 Wend. 267.

Necessity of consideration.—Under the statutes a valid jointure or a pecuniary provision in the nature of a jointure must be supported by some valuable consideration as a compensation for the relinquishment of the right to dower. *Graham v. Graham*, (1893) 67 Hun 329, 22 N. Y. S. 299, affirmed (1894) 143 N. Y. 573, 38 N. E. 722.

§ 198. When dower barred by pecuniary provisions. Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

This section was derived from Real Property Law of 1896, § 178.

Section 198 of the Real Property Law of 1896 is now covered by section 228.

Partition of lands between husband and wife as barring dower: see DOMESTIC RELATIONS LAW, § 56.

Consent to receive gross sum in satisfaction of dower: see Code Civ. Pro., § 1617.

Antenuptial agreements.—The courts will regard with rigid scrutiny an antenuptial contract where it deprives a woman of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. *Graham v. Graham*, (1894) 143 N. Y. 573, 38 N. E. 722, affirming 67 Hun 329, 22 N. Y. S. 299; *Lamb v. Lamb*, (1897) 18 App. Div. 250, 46 N. Y. S. 219; *Clark v. Clark*, (1882) 28 Hun 509. Thus a provision in the will, which is not a full compliance with the antenuptial contract, will not bar the widow of her exemption. *Sheldon v. Bliss*, (1853) 8 N. Y. 31, affirming 7 Barb. 39. And the burden of proof is cast upon the husband, or his representatives, to show perfect good faith; and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate to the means of the husband. *Pierce v. Pierce*, (1877) 71 N. Y. 154, 27 Am. Rep. 22, affirming 9 Hun 50.

A pecuniary provision made for the benefit of an intended wife must be made in lieu of dower to bar her right thereto. Dower is favored by the law, and if there is a reasonable doubt as to whether an antenuptial agreement was made in lieu of dower, the widow will take both. *Brown v. Brown*, (1907) 117 App. Div. 199, 192 N. Y. S. 291. See also *Gray v. Gray*, (1896) 5 App. Div. 132, 39 N. Y. S. 57.

Where by an antenuptial agreement the woman covenanted that if, after marriage, the husband died first, she would accept \$1,500 "in full satisfaction of her dower in his estate, and shall bar her from claiming the same, either in his real or personal estate," and he covenanted to provide by will for the payment of that sum "in lieu of dower, or her rights as his widow in his estate," and the parties married and the husband died, having made provision by will as covenanted, it was held that the agreement was valid and remained in full force after marriage. *Matter of Young*, (1883) 92 N. Y. 235, affirming 27 Hun 54.

It has been uniformly held that an antenuptial contract, in order to be enforced, must be in writing, and the existence of which could not be open to question. *Lamb v. Lamb*, (1897) 18 App. Div. 250, 46 N. Y. S. 219.

Acceptance of gross sum.—It has been held that the acceptance by a wife of a gross sum in lieu of her dower, in the lifetime of her husband, did not defeat her dower. *Crain v. Cavana*, (1862) 36 Barb. 410.

Covenant to release dower.—A covenant in an antenuptial agreement, whereby the intended wife agrees to release her dower, is a covenant running with the land, and passes by a conveyance executed by the husband to a third party, who is entitled to maintain an action to enforce a specific performance of the agreement. *Carpenter v. Carpenter*, (1886) 40 Hun 263.

Annuity in lieu of dower.—An annuity in lieu of dower can lawfully be created. *Mundy v. Munson*, (1886) 40 Hun 304.

Pecuniary provision as question of fact.—Whether or not a pecuniary provision was made is a question of fact to be determined in any action where that question shall arise, and when so determined is conclusive as to parties to that action, but as to none others. *Dworsky v. Arndtstein*, (1898) 29 App. Div. 274, 51 N. Y. S. 597.

§ 199. When widow to elect between jointure and dower.

If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

This section was derived from Real Property Law of 1896, § 179.

Section 199 of the Real Property Law of 1896 is now covered by section 229.

Limitation of action for dower: see Code Civ. Pro., § 1596.

Necessity of consideration.—Courts of equity will not entertain jurisdiction to enforce mere voluntary agreements not founded upon any consideration, either in favor of the wife against the husband or in his favor against the wife; but if they have been consummated, and are fair and just, courts of equity will uphold the transaction, except as against creditors. *Hendricks v. Isaacs*, (1889) 117 N. Y. 411, 22 N. E. 1029, 15 A. S. R. 524, 62 L. R. A. 359, reversing 52 Hun 109, 5 N. Y. S. 105.

Express declaration.—Where a testator after various devises and bequests to and for the benefit of his wife, declared it to be his will that the provisions so made should be "accepted and received by her in lieu and bar of her dower, and of all claims she may have upon or against the" testator's estate, as his widow, and upon his death the widow accepted the provisions made for her, it was held that said declaration was not simply for the benefit of the other devisees and legatees, but was in case of the estate, and barred the widow from any other share thereof, and therefore she was not entitled to share under the statute of distributions in two lapsed legacies. *Matter of Benson*, (1884) 96 N. Y. 439, 48 Am. Rep. 646.

Testamentary provision inconsistent with dower.—The provisions of a will under which a wife was given a house "to live in and to rent out and to keep in good repair during her life," and was entitled to keep for life any flat therein rent free, and was given a share for life in the income derived from so much of the house as she did not occupy herself, were held to be inconsistent with dower; and, where she continued to live in the house after her husband's death and occupied a flat therein she was deemed to have made her election and was not entitled to dower in the house. *Koezly v. Koezly*, (1900) 31 Misc. 397, 65 N. Y. S. 613.

Dower barred by lapse of time.—Where a contract was made by a wife with the committee of her husband, and she retained the consideration given her by such committee, and made no demand, during the seventeen years after her husband's death, for an admeasurement of her dower, it was held that her right of dower was barred. *Doremus v. Doremus*, (1892) 66 Hun 111, 21 N. Y. S. 13.

Dower barred by separation agreement.—A dower right may be barred or extinguished by articles of separation whereby a pecuniary provision in lieu

of dower was made and accepted. *Witthaus v. Schack*, (1887) 105 N. Y. 332, 11 N. E. 649, reversing 38 Hun 560; *Jones v. Fleming*, (1887) 104 N. Y. 418, 10 N. E. 693, reversing 37 Hun 227; *Morette v. Bostwick*, (1907) 56 Misc. 140, 106 N. Y. S. 1102, reversed on other grounds 127 App. Div. 701. And where a wife entered into a separation agreement with her husband in and by which he agreed to pay her the sum of \$5,200 per annum during her life or until her remarriage, and that he would provide by his will for the payment of said sum to her yearly after his death if she survived him, and she covenanted that at the request of her husband she would unite with him at any time in the execution of deeds of any real property he then owned or might thereafter acquire, "without compensation or payment other than hereinbefore provided," and such covenant, with all other provisions of the agreement, was to apply to and be binding upon the heirs of the parties, it was held that the agreement extinguished the wife's right of dower, and that the wife, having received and retained the pecuniary provision provided in the agreement for a period of six years, and not having returned or offered to return the same, elected to accept it in lieu of dower. *Hogg v. Lindridge*, (1912) 151 App. Div. 513, 135 N. Y. S. 928.

When widow estopped from asserting claim to dower.—A widow who permitted a purchaser of her husband's lands, from the executors, under a power, to pay the purchase money, with the assurance that the land was free from dower, and accepted and enjoyed the use of the whole of the proceeds, under her husband's will, was held estopped from subsequently asserting a claim to dower in the premises. *Wood v. Seely*, (1865) 32 N. Y. 105.

Additional provisions.—A widow is entitled to dower in addition to the testamentary provisions for her benefit unless it is clear from the terms of the will that the testator did not intend that she should have both, and it has been held that if a testator gives all his real estate to trustees, with power to make repairs and to sell or mortgage the real estate, the widow is not entitled to dower in addition to the testamentary provisions for her benefit. *Matter of Gordon*, (1902) 172 N. Y. 25, 64 N. E. 753, 92 A. S. R. 689, modifying 68 App. Div. 388, 74 N. Y. S. 259; *Asche v. Asche*, (1889) 113 N. Y. 232, 21 N. E. 70, affirming 47 Hun 285, 13 N. Y. St. Rep. 419; *Matter of Knabe*, (1916) 94 Misc. 67, 157 N. Y. S. 267; *Matter of Foster*, (1916) 93 Misc. 400, 156 N. Y. S. 1005, affirmed 174 App. Div. 864. But it has been held that additional provisions made for a widow, in the form of an income for life, did not put her to an election, as she was entitled to both. *Matter of Grotrian*, (1899) 30 Misc. 23, 62 N. Y. S. 996.

§ 200. Election between devise and dower. If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provisions so made, or be endowed of the lands of her husband; but she is not entitled to both.

This section was derived from Real Property Law of 1896, § 180.

Section 200 of the Real Property Law of 1896 is now covered by section 230.

Who may elect for insane widow: see 49 L. R. A. (N. S.) 1108 note.

Conflict of laws as to election: see L. R. A. 1915F 680 note.

Intention to put widow to an election.—The intention to put the widow to an election between dower and the provision in a will may not be inferred from the extent of the provision or because she is a devisee for life or in fee, or because it might seem to the court unjust as a family arrangement to permit her to claim both, or because it might be inferred that had the attention of the testator been called to it he would have expressly excluded dower. *Kouvalinka v. Schlegel*, (1887) 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494, affirming 39 Hun 451. Thus a mere request at the end of a devise that the widow release her dower in the residuary estate does not put the widow to her election. *Miller v. Miller*, (1898) 22 Misc. 582, 49 N. Y. S. 407.

When widow put to an election.—Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to

an election between them. *Matter of Gorden*, (1902) 172 N. Y. 25, 64 N. E. 753, 92 A. S. R. 689, modifying 68 App. Div. 388, 74 N. Y. S. 259; *Asche v. Asche*, (1889) 113 N. Y. 232, 21 N. E. 70, affirming 47 Hun 285, 13 N. Y. St. Rep. 419; *Matter of Vowers*, (1889) 113 N. Y. 569, 21 N. E. 690, reversing 45 Hun 418, 10 N. Y. St. Rep. 94; *Matter of Springsteen*, (1914) 86 Misc. 389, 149 N. Y. S. 278. But it has been held that this rule does not apply to conveyances by deed. *Huff v. Wheeler*, (1899) 27 Misc. 763, 59 N. Y. S. 716. And a provision in a will giving the entire estate to the widow so long as she remains such, and directing that in case she remarries she may retain one-third of the estate, the balance to be divided, share and share alike, between testator's children, is inconsistent with a claim of dower, and puts the widow to her election. *Jurgens v. Rogge*, (1896) 16 Misc. 100, 37 N. Y. S. 249.

As to abatement of legacy accepted by widow in lieu of dower, see 2 Ann. Cas. 976 note.

Intention to forfeit right of dower.—A widow does not forfeit her right to dower in the real estate of her deceased husband without evidence of a deliberate intention so to do expressed in some reliable form and with full knowledge of the nature and extent of the estate, and consequently of her right in it. *Hindley v. Hindley*, (1883) 29 Hun 318. And the receipt by the widow of one-third of the rent of the real estate, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, or bar her action therefor, and to constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention. *Aikman v. Harsell*, (1885) 98 N. Y. 186, affirming 31 Hun 634. See also *Ellicott v. Mosier*, (1852) 7 N. Y. 201, affirming 11 Barb. 574.

Exclusion of dower by other provision.—Dower is never excluded by a provision for the wife except by express words or necessary implication. Where there are no express words there must be on the face of the will a demonstration of the intent of the testator that the widow shall not take both dower and the provision; and such demonstration is furnished only where there is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit of the provision. *Kouvalinka v. Schlegel*, (1887) 104 N. Y. 125, 9 N. E. 868, 58 Am. Rep. 494, affirming 39 Hun 451; *Closs v. Eldert*, (1898) 30 App. Div. 338, 51 N. Y. S. 881; *Kimbel v. Kimbel*, (1897) 14 App. Div. 570, 43 N. Y. S. 900; *Gray v. Gray*, (1896) 5 App. Div. 132, 39 N. Y. S. 57; *Jurgens v. Rogge*, (1896) 16 Misc. 100, 37 N. Y. S. 249; *Leonard v. Steele*, (1848) 4 Barb. 20; *Jackson v. Churchill*, (1827) 7 Cow. 287, 17 Am. Dec. 514. Thus a provision of a will in favor of the wife, in order to bar her claim to dower, must be so clear and incompatible therewith as to compel the conclusion that that was what the testator intended. Where there is no room for doubt it must be resolved in favor of the dower right. *Roessle v. Roessle*, (1914) 163 App. Div. 344, 148 N. Y. S. 659; *Orth v. Haggerty*, (1908) 126 App. Div. 118, 110 N. Y. S. 551. And where a provision is, by the express terms of the will, made in lieu of dower, the widow is obliged to make an election, whether to accept it, or to renounce it for what the law gives to her. She cannot have both, and she is at once chargeable with the duty of informing herself, so as to make her election; and that she shall have a certain period of time for that purpose, the legislature has provided what was deemed a reasonable season of delay, and its enactment that the election must be made within one year has the same force as a statute of limitation upon the widow's rights. *Akin v. Kellogg*, (1890) 119 N. Y. 441, 23 N. E. 1046, affirming 48 Hun 459, 1 N. Y. S. 846.

Effect of acceptance of testamentary provisions.—By the acceptance of the provisions of a will, a widow is presumed to have assented to all the terms and conditions annexed to them and to yield every right inconsistent with such terms and conditions. *Lee v. Tower*, (1891) 124 N. Y. 370, 26 N. E. 943; *Matter of Zahrt*, (1884) 94 N. Y. 605; *Vernon v. Vernon*, (1873) 53 N. Y. 351, modifying 7 Lans. 492; *Chamberlain v. Chamberlain*, (1871) 43 N. Y. 424, modifying 3 Lans. 348; *Palmer v. Voorhis*, (1861) 35 Barb. 479; *Adsit v. Adsit*, (1817) 2 Johns. Ch. 448; *Lang v. Everling*, (1893) 3 Misc. 530, 23 N. Y. S. 329. And when a testamentary disposition in favor of the wife, by the husband, is not expressed to be in lieu of dower, she is not put

to her election, unless the terms and provisions of the will be totally inconsistent with her claim. *Lasher v. Lasher*, (1852) 13 Barb. 106.

Where the will of a testator gave to his wife the use and income of his real estate during life, the same to be, as stated, "enjoyed, accepted and received by her in lieu of dower, and in addition to what she would have as doweress if this devise was not so made to her," it was held that the devise was in lieu of dower, and that the devisee, having accepted the provision made, was not entitled to dower. *Nelson v. Brown*, (1895) 144 N. Y. 384, 39 N. E. 355, affirming 66 Hun 311, 20 N. Y. S. 978. See also *Starr v. Starr*, (1889) 54 Hun 300, 7 N. Y. S. 580, affirmed (1892) 132 N. Y. 154, 30 N. E. 384.

Construction of additional provision.—Where testamentary provisions for a widow have been held not to exclude dower, a gift to her of the "use and improvement" of one-third of all the testator's real estate must be construed to give her, beside her dower interest, the use of one-third of two-thirds, or two-ninths, of the real estate. *Dunklee v. Butler*, (1899) 30 Misc. 58, 62 N. Y. S. 921.

Dower under trust estate.—It has been held that a provision made for a widow under a trust, which vested the entire legal estate in the trustees, was inconsistent with a right of dower, and that she was bound to elect. *Savage v. Burnham*, (1858) 17 N. Y. 561. See also *Matter of Springsteen*, (1914) 86 Misc. 389, 149 N. Y. S. 278; *Matter of Smith*, (1892) 1 Misc. 269, 22 N. Y. S. 1067.

Devise with remainder over.—A devise of the testator's whole estate to his widow for life, with remainder over, is not a provision in lieu of dower, unless such be plainly the intent of the testator, from the other clauses of the will, and the widow may claim one-third and the residue under the will. *Lewis v. Smith*, (1854) 9 N. Y. 502, 61 Am. Dec. 706, affirming 11 Barb. 152. See also *Purdy v. Purdy*, (1897) 18 App. Div. 310, 46 N. Y. S. 215.

Legacy in lieu of dower.—It is the policy of the law to scrupulously guard a bequest to a widow in lieu of dower against diminution so long as there may be funds of the estate out of which the same may be paid. *Matter of Woodbury*, (1903) 40 Misc. 143, 81 N. Y. S. 503. See also *Matter of Hodgman*, (1893) 140 N. Y. 421, 35 N. E. 660, affirming 69 Hun 484, 23 N. Y. S. 725; *Ferris v. Ferris*, (1894) 10 Misc. 320, 30 N. Y. S. 982. And where a legacy is given to a wife in consideration of or in lieu of her dower, such legacy is entitled to priority over general legacies which are mere bounties. *Matter of McKay*, (1893) 5 Misc. 123, 25 N. Y. S. 725.

§ 201. **When deemed to have elected.** Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons; and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of

the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

This section was derived from Real Property Law of 1896, § 181.

Section 201 of the Real Property Law of 1896 is now covered by section 231.

Notice of lis pendens: see Code Civ. Pro., § 1670 et seq.

Intention of testator as controlling.—Dower is favored by the law, and it is never excluded by a provision for the wife, except by express words or by necessary implication. Where there are no express words, there must be upon the face of the will a demonstration of the testator that the widow shall not take both dower and the provision, and the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility arising on the face of the will between a claim of dower and a claim to the benefit given by the will. In re Amsinck, (1913) 155 N. Y. S. 1089. And a widow is entitled to dower in addition to testamentary provisions in her favor unless it is clear from the will that she should not have both, and where testator gave his real and personal property to trustees without power to sell or mortgage the realty, but directed them to pay the net profits of the estate to his widow during her life or until her remarriage, in the latter event her interest in testator's estate to be limited to dower, it was held that she was entitled both to dower and the testamentary provisions for her benefit. Matter of Knabe, (1916) 94 Misc. 67, 157 N. Y. S. 267.

Time within which to make election.—A widow must make her election within one year after her husband's death, unless the time be extended. Jones v. Fleming, (1887) 104 N. Y. 418, 10 N. E. 693, reversing 37 Hun 227; Roessle v. Roessle, (1914) 163 App. Div. 344, 148 N. Y. S. 659; Matter of Tailor, (1911) 147 App. Div. 741, 133 N. Y. S. 122, affirmed without opinion (1912) 205 N. Y. 599, 98 N. E. 1116; Lee v. Timken, (1896) 10 App. Div. 213, 41 N. Y. S. 979; Matter of Woodbury, (1903) 40 Misc. 143, 81 N. Y. S. 503; Matter of Smith, (1892) 1 Misc. 269, 22 N. Y. S. 1067; Doremus v. Doremus, (1892) 66 Hun 111, 21 N. Y. S. 13; Grout v. Cooper, (1876) 9 Hun 326. And where she does not comply with the provisions of the section she is presumed to have elected to take under the will. Matter of Stuyvesant, (1911) 72 Misc. 295, 131 N. Y. S. 197; Ferris v. Ferris, (1894) 10 Misc. 320, 30 N. Y. S. 982; Duffy v. Duffy, (1893) 70 Hun 135, 24 N. Y. S. 408. Such election may be imposed only when the testamentary provisions confer some benefit to the widow. Lang v. Everling, (1893) 3 Misc. 530, 23 N. Y. S. 329.

Extension of time.—Where the time within which an election may be made has begun to run, and has not expired, it may be enlarged by the order of any court competent to pass upon the accounts of executors, administrators, or testamentary trustees, or to admeasure dower, upon an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise, or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator cannot be ascertained within the period so limited, or other reasonable cause therefor. Bradhurst v. Field, (1890) 57 Hun 587, 10 N. Y. S. 452.

Section as statute of limitation.—Where a provision is, by the express terms of the will, made in lieu of dower, the widow is obliged to make an election, whether to accept it or to renounce it for what the law gives to her. She cannot have both, and she is at once chargeable with the duty of informing herself, so as to make her election; and that she shall have a certain period of time for that purpose, the legislature has provided what was deemed a reasonable season of delay, and its enactment that the election must be made within one year has the same force as a statute of limitation upon the widow's rights. Akin v. Kellogg, (1890) 119 N. Y. 441, 23 N. E. 1046, affirming 48 Hun 459, 1 N. Y. S. 816. And the section, as a statute of limitation, to be available to either party, should be pleaded by the one who relies upon it. Evans v. Ogsbury, (1896) 2 App. Div. 556, 37 N. Y. S. 1104.

Ignorance of value of husband's estate.—A widow's ignorance of the condition of her husband's estate, or the fact that a testamentary provision is

disproportionate to the value of her dower, has been held not to relieve her from the effect of the statute. *In re Nagel*, (1891) 12 N. Y. S. 707. If she elects to take the testamentary provision she must do so on the assumption that it will be paid if there is any property with which to pay it. *Sanford v. Sanford*, (1875) 4 Hun 753.

Acceptance of legacy.—The acceptance by a widow of payment of a legacy within one year after her husband's death has been held to be proof of her election to take such pecuniary provision in lieu of her dower. *Matter of Tisdale*, (1906) 110 App. Div. 857, 97 N. Y. S. 494; *Beekman v. Vanderveer*, (1885) 3 Dem. 619.

Effect on legacy of widow's death within one year.—It has been held that the death, within a year after the death of her husband, of a widow entitled to a legacy under his will in lieu of dower, without having exercised her right of election, vests the right to collect the legacy in her executor. *Flynn v. McDermott*, (1905) 183 N. Y. 62, 75 N. E. 931, 111 A. S. R. 687, 5 Ann. Cas. 81, 2 L. R. A. (N. S.) 959, affirming 102 App. Div. 56, 89 N. Y. S. 506, 92 N. Y. S. 1123. And where the provisions of a will were more favorable to a widow than her dower right, and she died before the expiration of the one year specified by statute, it was held that she was presumed to have elected to accept such provision. *Doty v. Hendrix*, (1891) 16 N. Y. S. 284.

Insanity of widow.—A widow's right of election between dower and a testamentary provision in lieu thereof is wholly personal, and where she is insane at the time of the testator's death and continues so, her silence or failure to enter or to commence action for dower is not an election to accept the testamentary provision, and even though a committee has been appointed and the widow is confined in an asylum, the state commission in lunacy has no authority to elect on her behalf. *Camardella v. Schwartz*, (1908) 126 App. Div. 334, 110 N. Y. S. 611.

Cited.—This section was cited in *Roessle v. Roessle*, (1914) 163 App. Div. 344, 148 N. Y. S. 659.

§ 202. When provision in lieu of dower is forfeited. Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

This section was derived from Real Property Law of 1896, § 182.

Section 202 of the Real Property Law of 1896 is now covered by section 232.

When dower barred by misconduct: see *supra*, § 196.

Action for dower barred by assignment: see Code Civ. Pro., § 1604.

§ 203. Effect of acts of husband. An act, deed or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him, or any laches, default, covin, or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

This section was derived from Real Property Law of 1896, § 183.

Acknowledgments and proofs of married women: see *infra*, § 302.

Rights and liabilities of husband and wife: see DOMESTIC RELATIONS LAW, § 50 et seq.

When married woman is party to an action: see Code Civ. Pro., § 450.

Confession of judgment: see Code Civ. Pro., § 1273 et seq.

Presence of husband as defense to married woman charged with crime: see PENAL LAW, § 1092.

Effect of deed by wife.—A wife is precluded from setting up her claim of dower so long as a deed stands in which she has joined with her husband. *Sanford v. Ellithorp*, (1884) 95 N. Y. 48.

Effect of deed by committee of wife.—It has been held that the act of a committee of a wife in joining with the husband in executing a deed of lands in which the wife had an inchoate right of dower did not extinguish such right. *Dunn v. Heuther*, (1892) 64 Hun 18, 22 Civ. Pro. 118, 18 N. Y. S. 723.

Seizin by husband of vested remainder.—Where a husband is seized of a vested remainder expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower subject to be defeated as above. But the husband cannot alienate or encumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband. *House v. Jackson*, (1872) 50 N. Y. 161.

Dower in lands held by husband as trustee.—Dower does not attach to lands of which the husband is seized as trustee in behalf of others, any further than he has a beneficial interest therein, or to lands in which he has an equitable interest merely as cestui que trust or use, or if the right does attach in contemplation of law, wherever there is a legal title and seizure in the husband though it be for the benefit of others, still it attaches sub modo and subject to the equities which may exist against it and by which the court will undertake to control and regulate the right and if necessary restrain the wife from asserting it. *Coster v. Clarke*, (1841) 3 Edw. Ch. 428.

§ 204. Widow's quarantine. A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

This section was derived from Real Property Law of 1896, § 184.

Widow's quarantine as incorporated in Magna Charta.—The doctrine of a widow's quarantine was embedded in Magna Charta as follows: "A widow, after the death of her husband, shall straightway, and without difficulty, have her marriage portion and her inheritance, nor shall she give any thing in return for her dowry, her marriage portion, or the inheritance which belonged to her, and which she and her husband held on the day of the death of that husband. And she may remain in the house of her husband, after his death, for forty days; within which her dowry shall be paid over to her." See *Matter of Williams*, (1898) 31 App. Div. 617, 52 N. Y. S. 700.

Who is entitled to quarantine.—It is only the widow of a decedent who leaves real estate in which she has a dower interest, who is entitled to the provisions of the section. *In re Mehm*, (1910) 124 N. Y. S. 173; *Matter of Menschke*, (1908) 61 Misc. 9, 114 N. Y. S. 722.

Allowance for fuel and provisions.—It has been held that a widow may have a money allowance in lieu of fuel and provisions, where such articles do not exist, as specified in section 2670 of the Code of Civil Procedure. *Matter of Stiles*, (1909) 64 Misc. 658, 120 N. Y. S. 714; *Matter of Berns*, (1907) 52 Misc. 426, 103 N. Y. S. 167; *Matter of Hulse*, (1903) 41 Misc. 307, 84 N. Y. S. 220; *Matter of Henbury*, (1902) 37 Misc. 454, 75 N. Y. S. 933.

Allowance for nurse.—A widow who had not "a diseased organ about her," and whose only ailment was the knowledge that "there had been some crooked work done," and who was about the house daily, and able to eat

toast, cereals, and eggs, was held not entitled, under a fair construction of the statute, to a nurse as a part of "her reasonable sustenance." *Matter of Percival*, (1913) 79 Misc. 567, 141 N. Y. S. 180.

Allowance for board.—Where a decedent leaves real property in which his widow has dower, she is entitled to forty days sustenance, which, in the absence of other proof as to its value, may be allowed to her at the rate paid for her board during the husband's lifetime. *Matter of Stiles*, (1909) 64 Misc. 658, 120 N. Y. S. 714.

Right of widow to be reimbursed.—It has been held that a widow is entitled to be reimbursed sums expended by her for reasonable support and maintenance during her quarantine. *Matter of Brown*, (1912) 77 Misc. 507, 137 N. Y. S. 978.

Application of section to insolvent estate.—The provisions of the section being general, they have been held to apply to an insolvent as well as a solvent estate. But the allowance is only intended to apply to the sustenance of the widow herself, and no provision is made by law for the maintenance of the children of her deceased husband, out of an insolvent estate, beyond the exempt articles allowed to the widow for that purpose. *Johnson v. Corbett*, (1844) 11 Paige 265.

Effect of expiration of quarantine.—After the expiration of forty days the heirs at law are entitled to possession, and the widow is relegated to her right of action for assignment of dower; but during the forty days her possession is lawful and cannot be disturbed. *Underground Electric Rys. Co. v. Owsley*, (1909) 169 Fed. 671, affirmed 176 Fed. 26, 99 C. C. A. 500; *Lincoln Trust Co. v. Hutchinson*, (1910) 65 Misc. 590, 120 N. Y. S. 811; *Siglar v. Van Riper*, (1833) 10 Wend. 414; *Jackson v. O'Donaghy*, (1816) 7 Johns. 247. And in a proceeding to distribute surplus moneys arising upon a mortgage foreclosure, the widow of a mortgagor who continued in the possession of the mortgaged premises during the period between the expiration of her quarantine and the delivery of the referee's deed, was held to be chargeable with only two-thirds of the value of such use and occupation, although she could acquire no estate until her dower had been assigned to her. *Shuler v. Levy*, (1911) 73 Misc. 25, 130 N. Y. S. 600.

Cited.—This section was cited in *Peters v. Tallchief*, (1907) 121 App. Div. 309, 106 N. Y. S. 64.

§ 205. Widow may bequeath a crop. A widow may bequeath a crop in the ground of land held by her in dower.

This section was derived from Real Property Law of 1896, § 185.

Section 205 of the Real Property Law of 1896 is now covered by section 240.

Section as declaratory of common law.—It has been held from the earliest times that a widow was entitled to crops growing on the land assigned to her for dower. *Clark v. Battorf*, (1873) 1 Thomp. & Co. 58.

§ 206. Divorced woman may release dower. A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

This section was derived from Real Property Law of 1896, § 186.

Section 206 of the Real Property Law of 1896 is now covered by section 241.

Effect of release.—As the statute allows a wife after a decree of absolute or limited divorce to release her inchoate dower to her husband, such a release, together with an absolute conveyance by the husband of lands purchased by him after a decree of separation, conveys a perfect title, and a

vendee of such lands will be compelled specifically to perform; and such release is good even though the husband stipulated in the action for separation that he was guilty of nonsupport and that the decree be entered, especially when the court has personally interrogated the wife as to the release of dower and has satisfied itself that the action was not fraudulent or collusive. *Schlesinger v. Klinger*, (1906) 112 App. Div. 853, 98 N. Y. S. 545.

Divorce obtained in other states.—There are a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states upon grounds insufficient for that purpose in this state when the defendant resided here and was not personally served with process and did not appear in the action. *Starbuck v. Starbuck*, (1903) 173 N. Y. 503, 66 N. E. 193, 93 A. S. R. 631, reversing 62 App. Div. 437, 71 N. Y. S. 104; *Matter of Kimball*, (1898) 155 N. Y. 62, 49 N. E. 331, affirming 18 App. Div. 320, 46 N. Y. S. 177, writ dismissed 174 U. S. 158, 19 S. Ct. 639, 43 U. S. (L. ed.) 932; *Williams v. Williams*, (1891) 130 N. Y. 193, 29 N. E. 98, 27 A. S. R. 517, 14 L. R. A. 220; *De Meli v. De Meli*, (1890) 120 N. Y. 485, 24 N. E. 996, 17 A. S. R. 652; *Cross v. Cross*, (1888) 108 N. Y. 628, 15 N. E. 333; *O'Dea v. O'Dea*, (1885) 101 N. Y. 23, 4 N. E. 110. And where a wife obtained a judgment of separation from her husband in this state and then went to Kansas, where she afterwards procured an absolute divorce from him on the ground of cruelty, without personal service upon him or his appearance in the action, and afterwards married, she was held bound by the judgment and could not recover dower in lands thereafter acquired by her husband, nor in lands which he owned at the time of the divorce. *Voke v. Platt*, (1905) 48 Misc. 273, 96 N. Y. S. 725.

§ 207. Married women may release dower by attorney. A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

This section was derived from Real Property Law of 1896, § 187.

Section 207 of the Real Property Law of 1896 is now covered by section 247.

Release of dower to husband on partition sale: see Code Civ. Pro., § 1571.

Right to release dower by contract with husband: see Ann. Cas. 1917A 48 note.

Effect of husband's conveyance under the section.—Where a married woman executes a power of attorney to her husband, empowering him to sell and convey all lands belonging to her, and to execute in her name “all necessary or proper deeds, conveyances, releases, releases of dower and thirds, and rights of dower,” for conveying any “right, title and interest, whether vested or contingent, choate or inchoate,” the husband is authorized to sign the name of his wife to a deed conveying real estate owned by him, and so, to release her inchoate right of dower in the land. *Wronkow v. Oakley*, (1892) 133 N. Y. 505, 31 N. E. 521, 28 A. S. R. 661, 16 L. R. A. 209, reversing 64 Hun 217, 19 N. Y. S. 51.

ARTICLE 7

LANDLORD AND TENANT

- Section 220.** Action for use and occupation.
221. Rent due on life leases recoverable.
222. When rent is apportionable.
223. Rights where property or lease is transferred.
224. Attornment by tenant.
225. Notice of action adverse to possession of tenant.
226. Effect of renewal on sub-lease.
227. When tenant may surrender premises.
228. Termination of tenancies at will or by sufferance, by notice.
229. Liability of tenant holding over after giving notice of intention to quit.
230. Liability of tenant holding over after receiving notice to quit.
231. Lease, when void; liability of landlord where premises are occupied for unlawful purpose.
232. Duration of certain agreements in New York.

§ 220. Action for use and occupation. The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.

This section was derived from Real Property Law of 1896, § 190.

Section 220 of the Real Property Law of 1896 is now covered by section 255. *Lease for term not exceeding three years as within recording acts: see infra* § 290, subd. 3.

When action of ejectment may be brought for nonpayment of rent: see Code Civ. Pro., § 1504.

Effect of appeal from judgment for rent: see Code Civ. Pro., § 1310.

Leases of corporate real property: see GENERAL CORPORATION LAW, § 70 et seq.

Effect on lease of tenant's becoming alien enemy: see Ann. Cas. 1917C 202 note.

Nature of tenancy created by occupancy under invalid lease: see notes 17 Ann. Cas. 540; 42 L. R. A. (N. S.) 648; 26 L. R. A. 799.

"For the use and occupation."—It has been held that there must be actual and continued occupation during the whole period for which the landlord is allowed to recover. *Wood v. Wilcox*, (1845) 1 Denio 37; *Seaman v. Ward*, (1856) 1 Hilt. 52. See also *Cleves v. Willoughby*, (1845) 7 Hill 83.

Necessity of agreement to pay rent.—It has been held that an action to recover rent for the use and occupation of premises cannot be maintained without proof of an agreement, express or implied, to pay rent. *Lamb v. Lamb*, (1895) 146 N. Y. 317, 41 N. E. 26, affirming 76 Hun 186, 27 N. Y. S. 575; *Smith v. Stewart*, (1810) 6 Johns. 46, 5 Am. Dec. 186; *Jennings v. Alexander*, (1856) 1 Hilt. 154; *Coit v. Palmer*, (1868) 4 Abb. Pr. N. S. 140. And before a recovery can be had in an action for use and occupation of real estate it must be made to appear that the conventional relation of landlord and tenant existed between the parties; and while the possession and beneficial enjoyment of real property, with the consent of the owner, is ordinarily

sufficient to sustain an action upon an implied agreement for use and occupation, such an agreement cannot be implied where the circumstances attending the use and occupation show clearly there was no expectation of rent by either party. *Preston v. Hawley*, (1893) 139 N. Y. 296, 34 N. E. 906; *Collyer v. Collyer*, (1889) 113 N. Y. 442, 21 N. E. 114; *Kiersted v. Orange, etc., R. Co.*, (1877) 69 N. Y. 343, 25 Am. Rep. 199, reversing 1 Hun 151; *Matter of Sweeney*, (1916) 94 Misc. 617, 159 N. Y. S. 984; *Bancroft v. Wardwell*, (1816) 13 Johns. 489, 7 Am. Dec. 396. But until the relation of landlord and tenant is actually abrogated by some act of both parties to the agreement, or by the issuing of the warrant in dispossession proceedings, the relation of landlord and tenant continues. *Hinton v. Bogart*, (1915) 166 App. Div. 155, 151 N. Y. S. 796.

Receipt of key as presumption of tenancy.—While a tenancy may be implied from the taking of a key of premises for the purpose of occupying them, the mere receipt of the key raises no presumption of tenancy. *Levy v. Long Island Brewery*, (1899) 26 Misc. 410, 56 N. Y. S. 242. See also *Little v. Martin*, (1829) 3 Wend. 219, 20 Am. Dec. 688; *Townsend v. Albers*, (1854) 3 E. D. Smith 560. In an early case it was held that the delivery and acceptance of the key was sufficient to establish the fact of occupation. *Seaman v. Ward*, (1856) 1 Hilt. 52.

It has been held that the mere retention of the keys by the landlord did not show conclusively that there was an acceptance of a surrender of the premises; but was some evidence of acceptance, capable of being rebutted. *Thomas v. Nelson*, (1877) 69 N. Y. 118; *Tootle Theatre Co. v. Shubert Theatrical Co.*, (1916) 175 App. Div. 530, 162 N. Y. S. 111.

Necessity of seal.—It was early held that an action would lie to recover the stipulated rent due under an agreement not under seal. *Williams v. Sherman*, (1831) 7 Wend. 109.

Possession under contract to purchase.—Where one enters into possession of real estate under a verbal contract for the purchase of it, although the contract is void by the statute of frauds yet after the purchaser has continued in possession for a year an action will lie against him for use and occupation. Such an action will lie where the holding is upon an implied as well where it is under an express permission; and the tenant who goes in under an implied license is not to be permitted to dispute the title. *Pierce v. Pierce*, (1857) 25 Barb. 243.

Defense of constructive eviction.—Where a tenant is in possession of the premises at the institution of summary proceedings against him for non-payment of rent, the issuance of a dispossession warrant is not *res adjudicata* on the question of constructive eviction, as the tenant could not avail himself of such defense, and in an action for rent the defense of constructive eviction is waived where the defendant remains in actual possession of the premises until actually evicted by summary proceedings. *Ashton Holding Co. v. Ross*, (1917) 98 Misc. 586, 163 N. Y. S. 99.

Meaning of term "resume possession" in lease.—The words "resume possession," in a provision of the lease that the landlord may resume possession and relet the premises for the balance of the term for the account of the tenant, who shall make good any deficiency, have no restricted technical meaning and will be construed as covering all lawful means of retaking possession of the premises, summary dispossession and dispossession proceedings. *Ashton Holding Co. v. Ross*, (1917) 98 Misc. 586, 163 N. Y. S. 99.

Meaning of term "re-enter."—The term "re-enter" in a lease reserving to the lessors the right upon default "into and upon said premises to re-enter and . . . the same to have again . . . as in their first and former estate," and upon which re-entry depends a covenant by the lessee to pay any deficiency arising on the reletting of the premises by the lessors as his agents, means only a re-entry in its technical sense as known to the common law by ejectment, and does not include the removal of the lessee by statutory summary proceedings. *Michaels v. Fishel*, (1902) 169 N. Y. 381, 62 N. E. 425, affirming 51 App. Div. 274, 64 N. Y. S. 1007. As was said in *Fleisher v. Friob*, (1916) 97 Misc. 343, 161 N. Y. S. 940, affirmed 177 App. Div. 921: "Since the decision of *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425 (1902), it is well settled that a provision permitting the landlord merely to 're-enter' for covenant broken refers solely to re-entry by the common-law action of ejectment, and that consequently where, in a lease, it was further provided that in the event of such re-entry the landlord might relet as the agent of the tenant,

receive the rent, and hold the tenant liable for any deficiency, the landlord's privilege, and the consequent obligation of the tenant to respond in damages for the difference in rent, did not survive a dispossession by summary proceedings. As a result of that decision, there was an extensive, and in some cases an intelligent, revision of the forms of leases. In *Ansolone v. Paskusz*, 96 App. Div. 188, 89 N. Y. Supp. 203 (1904), a lease was considered which contained a clause similar to the one interpreted in the *Michaels Case*, except that it permitted the landlord to 're-enter the premises either by force or otherwise,' and provided for the survival of the tenant's obligation to indemnify the landlord for a difference in rent of the premises when relet after any such re-entry. It was there held (96 App. Div. 193, 89 N. Y. Supp. 203), after consideration of the *Michaels Case*, that: "The word 'otherwise' necessarily broadens the signification of the word 're-enter' and prevents its limitation to the technical definition of that word." It was decided, therefore, that the tenant's obligation to indemnify the landlord, and the provisions in the lease covering a deposit of \$2,000, as security, survived the removal of the tenant by summary proceedings. Other examples of forms of leases designed to overcome the technical difficulty are to be found in *Baylies v. Ingram*, 84 App. Div. 360, 82 N. Y. Supp. 891 (1903), affirmed without opinion 181 N. Y. 518, 73 N. E. 1119; *Asher-Simon Realty Co. v. Goldberg*, 61 Misc. Rep. 634, 114 N. Y. Supp. 413 (1909); and *Pannuto v. Foglia*, 55 Misc. Rep. 244, 105 N. Y. Supp. 495 (1907). See, also, *Longobardi v. Yuliano*, 33 Misc. Rep. 472, 67 N. Y. Supp. 902 (1900). On the other hand, careless revision of forms of leases has failed of its purpose. Thus in *Wolf v. Rudinsky*, 135 App. Div. 175, 119 N. Y. Supp. 1007 (1909), the lease contained two clauses, the eighth and sixteenth, identical. It was there pointed out that the survival of the tenant's obligation was 'limited to the contingency of the premises becoming vacant,' and that therefore the obligation did not survive where the dispossession was for nonpayment of rent. See, also, *Claude v. Shepard*, 122 N. Y. 97, 402, 403, 25 N. E. 358 (1890). The distinction is, of course, a narrow one, and has occasionally been overlooked. Appellants now cite to us a case reported since the trial herein, i. e., *Blum v. Corday*, 160 N. Y. Supp. 613, affirmed without opinion 170 App. Div. 976, 155 N. Y. Supp. 1095, and approved in *Halpern v. Manhattan, etc., Corp.*, 160 N. Y. Supp. 616, 621 (July, 1916), where a similar provision for the continuance of the tenant's obligation was held to survive a dispossession for nonpayment of rent, although the survival was expressly conditioned solely upon the premises becoming vacant. An examination of the briefs submitted on the appeal in the *Blumberg Case* discloses, however, that the point was not made nor even remotely suggested by counsel for either party, and the court's attention was consequently directed to other phases of the case."

§ 221. **Rent due on life leases recoverable.** Rent due on a lease for life or lives is recoverable by action, as well after as before the death of the person on whose life the rent depends, and in the same manner as rent due on a lease for years.

This section was derived from Real Property Law of 1896, § 221.

Section 221 of the Real Property Law of 1896 is now covered by section 256.

Disposition of rents to accrue and be received: see supra, § 60.

Release of rents reserved by leases in perpetuity: see supra, § 72.

Power of life tenant to make leases: see supra, § 155.

Distress for rent.—In this state distress for rent was abolished in 1846 (L. 1846, ch. 274), but the remedy of re-entry still survives. It can be exercised only when the right is expressly reserved in the lease, for without such reservation the remedy of the lessor under the lease and independent of the statute is confined to an action on the covenant. The method of exercising the right is by an action of ejectment to recover possession of the demised premises. *Michaels v. Fishel*, (1902) 169 N. Y. 381, 62 N. E. 425, affirming 51 App. Div. 274, 64 N. Y. S. 1007. See also *Peabody v. Longacre Square Bldg. Co.*, (1907) 188 N. Y. 103, 80 N. Y. 657, reversing 112 App. Div. 114, 98 N. Y. S. 242; *Cohen v. Carpenter*, (1908) 128 App. Div. 862, 113 N. Y. S. 168.

Action by husband and wife.—Where a lease is executed by husband and wife, of land in which the wife has an estate for life, and the lessee covenants, in terms, to pay rent to both, this of itself is sufficient to entitle the husband and wife to join in an action for the rent, notwithstanding the wife did not acknowledge the execution of the lease and therefore was not bound by it. *Jacques v. Short*, (1855) 20 Barb. 269.

§ 222. When rent is apportionable. Where a tenant for life, who shall have demised the real property, dies before the first rent day, or between two rent days, his executor or administrator may recover the proportion of rent which accrued to him before his death.

This section was derived from Real Property Law of 1896, § 192.

Section 222 of the Real Property Law of 1896 is now covered by section 257.

Apportionment of rents upon death: see Code Civ. Pro., § 2674.

Accrued rent as asset of decedent's estate: see Code Civ. Pro., § 2672, subd. 7.

When rents may be received by executor or administrator: see Code Civ. Pro., § 2701.

Preference of rents due or accruing on leases held by decedent: see Code Civ. Pro., § 2682.

Lease of real property to pay decedent's debts: see Code Civ. Pro., § 2703 et seq.

Purpose and scope of section.—This section applies only to cases where the demise is by the life tenant, and is a re-enactment of the statute, II Geo. 2, ch. 19, § 15, which was passed to remedy the difficulty arising out of the common law doctrine as to the apportionment of rent. Where the life tenant died before the rent reserved under a lease made by him fell due, the rent was lost both to his executor and to the reversioner. The executor could not recover because the title to the land had failed, and the remaindermen could not recover because the rent did not accrue during the time when he had title. The rent could not be apportioned and consequently was entirely lost. The statute was passed to cure this evil, but it was intended to apply and does apply in terms only to leases determinable on the life of the tenant for life. *Stillwell v. Doughty*, (1855) 3 Bradf. 359.

Apportionment with remaindermen.—In an early case it was held that rent was not apportionable between the executors of a tenant for life, and the remaindermen; and this, notwithstanding the tenancy for life was created as a provision for a widow. *Marshall v. Mosley*, (1860) 21 N. Y. 280. It was also held that an apportionment of rent was not allowable between the executor of a lessor owning the fee and the remainderman. A remainderman who succeeds to the reversion is entitled to the whole rent as an entire sum due to him. *Fay v. Holloran*, (1861) 35 Barb. 295.

"Which accrued to him."—The words "which accrued to him" before his death signify rents that have become due and payable at the time of the testator's death. *Fay v. Holloran*, (1861) 35 Barb. 295.

§ 223. Rights where property or lease is transferred. The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the

breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against incumbrances or relating to the title or possession of the premises leased. This section applies as well to a grant or lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, eighteen hundred and five, or after the fourteenth day of April, eighteen hundred and sixty.

This section was derived from Real Property Law of 1896, § 193.

Section 223 of the Real Property Law of 1896 is now covered by section 258.

Effect of conveyance where property is leased: see *infra*, § 248.

Removal of person holding over after land sold: see Code Civ. Pro., § 2232.

Action for waste generally: see Code Civ. Pro., § 1651 et seq.

Distinction between assignment and sublease: see 7 Ann. Cas. 537 note.

Restrictive covenants against assignment: see Ann. Cas. 1913A 1202 note; Ann. Cas. 1913B 889 note.

Effect of assignment on liability for rent: see Ann. Cas. 1916E 788 note, 52 L. R. A. (N. S.) 969 note.

Liability of assignee without formal assignment: see Ann. Cas. 1914B 466 note.

Right of assignee to sue on covenant assuring lessee the exclusive right to conduct a certain business on premises: see L. R. A. 1915C 860 note.

Transfer of reversion in leased property: see L. R. A. 1915C 190.

Scope of section.—The section creates no new right and does not, as between lessor and lessee or their assigns, enlarge the rights and obligations imposed upon either party by the terms of the lease, and has nothing to do with the rights and duties of the owner of the fee as against the owners of the right to collect the rent reserved in the original lease. *Morehouse v. Woodruff*, (1916) 218 N. Y. 494, 113 N. E. 512, reversing 164 App. Div. 966, 149 N. Y. S. 1098. See also *Van Rensselaer v. Hays*, (1859) 19 N. Y. 68, 75 Am. Dec. 278, affirming 27 Barb. 104.

Presumption of assignment.—Possession of the demised premises by one not a lessee is sufficient evidence of an assignment to him by the lessees in the first instance, but the defendant may disprove that he was in possession as assignee and show under what claim of right or title he made entry. *Reynolds v. Lawton*, (1889) 55 Hun 603, 8 N. Y. S. 403.

Effect of assignment of whole term.—Where the lessee makes an absolute assignment of the whole term the assignee and his representatives are liable upon all the covenants which run with the land; and this, whether the assignee takes actual possession of the premises or not. *Tate v. Neary*, (1900) 52 App. Div. 78, 65 N. Y. S. 40; *Walton v. Cronly*, (1835) 14 Wend. 63. See also *Thacker v. Henderson*, (1862) 63 Barb. 271; *Tyler v. Heidorn*, (1866) 46 Barb. 439; *Van Rensselaer v. Secor*, (1860) 32 Barb. 469; *Main v. Davis*, (1860) 32 Barb. 461; *Jacques v. Short*, (1855) 20 Barb. 269. But where there were two joint makers of a promissory note held by the plaintiff, and one, in consideration of a demise of premises to him by the other, agreed, in and by the lease, to pay the note in part payment of the rent, and afterwards transferred the lease and his right to the demised premises to the defendant, who entered into possession, it was held that the holder of the note could not sustain an action against the assignee for its amount; and the agreement of the lessee to pay the note did not run with the estate in the land, and therefore did not bind his assignee. *Dolph v. White*, (1855) 12 N. Y. 296.

Assignment of rent without parting with reversion.—Rent may be assigned by a lessor without parting with the reversion; and although in such case there is no privity of estate or contract between the assignee and lessee, yet the former may sue in his own name for rent accruing after the assignment. *Willard v. Tillman*, (1842) 2 Hill 274. And the assignee of a lease for the whole of the unexpired term is liable to the lessor for the rent reserved by reason of privity of estate. His liability, therefore, continues no longer than his estate. The lessee, on the other hand, is liable both by reason of privity of estate and contract. Although the privity of estate ceases when he assigns,

the privity of contract remains, and his liability on his contract continues. *Reynolds v. Lawton*, (1889) 55 Hun 630, 8 N. Y. S. 403.

Assignment for benefit of creditors.—An assignment of property in trust for the benefit of creditors, which conveys all the real estate of the grantor and all leases, reservations, and rents thereof, together with all debts due for rents of land, passes to the assignee the covenants, conditions, or right of entry contained in a lease in fee. *Main v. Green*, (1860) 32 Barb. 448.

Assignment of future rents.—It is entirely competent for the owner of premises to assign rents to accrue therefrom in the future, and the assignee, without the attornment to him by the tenant, is entitled thereto and may maintain an action to recover the same, regardless of whether or not he has a right to re-enter or to have a receiver appointed. Such an assignment may be made by a bond and mortgage and may be limited to the rents to become due and payable after default. *Sullivan v. Rosson*, (1915) 166 App. Div. 68, 151 N. Y. S. 613.

Assignment of expired lease.—The assignment of a lease that has expired conveys no term, because there is no term left to convey. "Form cannot create substance and the most formal transfer of a term that has passed is like the sale of gunpowder that has exploded. There is nothing left for the assignment to act upon and it passes no estate, for it does not touch the reversion." *United Merchants' Realty, etc., Co. v. Roth*, (1908) 193 N. Y. 570, 86 N. E. 544, affirming 122 App. Div. 628, 107 N. Y. S. 511.

Assignment of lease as collateral security.—Where a tenant, as collateral security for the payment of a mortgage upon certain fixtures in the leased premises, assigns the lease to the mortgagee, who lawfully enters into the premises by virtue of the assignment, the assignee after entry has a legal right to the possession during the term of the lease, subject only to the right of the original tenant to redeem. In such case the assignee's possession of the premises is neither that of a trespasser nor a subtenant, and so far as the landlord is concerned the assignee is in lawful possession of the estate of his assignor, the original tenant, by virtue of the assignment. By his own acts a privity of estate between him and the landlord is created, and so long as it continues he is liable for the rent of the premises until he divests himself of his estate by an assignment of his interest in the lease to a third party. *Century Holding Co. v. Ebling Brewing Co.*, (1917) 98 Misc. 226, 162 N. Y. S. 1061.

"Colorable assignment."—A "colorable assignment" has been defined to mean, not an assignment to avoid liability for rent, but where the assignor retains possession and the assignment is made to conceal his possession. *Century Holding Co. v. Ebling Brewing Co.*, (1917) 98 Misc. 226, 162 N. Y. S. 1061.

When acceptance of rent from assignee of tenant does not release tenant.—Neither the consent of the landlord to the assignment of the lease, nor his acceptance of the rent from the assignee, releases the original tenant from his covenant to pay rent. There must be an agreement, express or implied from other facts than the mere assent to the assignment and acceptance of rent from the assignee, to release the assignor. *Halbe v. Adams*, (1916) 172 App. Div. 186, 158 N. Y. S. 380. Where the terms of the lease are complete and unambiguous they cannot be altered or added to by proof of a prior verbal agreement to release the assignor. *Holbe v. Adams*, (1917) 176 App. Div. 588, 163 N. Y. S. 895.

Dispute of landlord's title.—The rule that a tenant cannot dispute his landlord's title applies only where the conventional relation of landlord and tenant exists. *Barson v. Mulligan*, (1901) 66 App. Div. 486, 73 N. Y. S. 262. It is well settled that every one entering into possession of demised premises is presumed to have entered under the lease, and that presumption can be rebutted successfully only by sufficient proof of an adverse possession at some time, in hostility to the landlord's title. Where the relation of landlord and tenant is once established it attaches to all who may succeed to the possession under the tenant, however remotely. *Bradt v. Church*, (1888) 110 N. Y. 537, 18 N. E. 357, affirming 39 Hun 262; *Whiting v. Edmunds*, (1884) 91 N. Y. 309. But estoppel of a tenant to deny the title of his landlord ceases when the premises are physically surrendered on the expiration of the term or a surrender is accepted by the landlord which terminates the term, though the tenant may not abandon the premises and repudiate the existing obligations of his lease by denying the landlord's

title. *Baker v. Citizens' Trust Co.*, (1909) 66 Misc. 622, 121 N. Y. S. 767, affirmed 137 App. Div. 888.

Right to interpose counterclaim.—The section does not authorize a tenant in summary proceedings against him for nonpayment of rent to interpose a counterclaim running in favor solely of his assignee, neither has the tenant the right to interpose a counterclaim, because his position is practically that of surety for his assignee of the lease. *Barney v. Du Vivier*, (1914) 86 Misc. 29, 147 N. Y. S. 913.

Rights of purchaser at partition sale.—The purchaser at a partition sale acquires the entire estate and interest of the parties and is entitled to bring summary proceedings against a tenant of the premises under a lease from the parties to the partition action. *R. S. S. Co. v. Apfel*, (1910) 69 Misc. 318, 125 N. Y. S. 484.

Tenant holding over.—In case a tenant holds over after the expiration of his term, the landlord may elect to consider him a tenant for a new term under an implied agreement arising by operation of law. A lessee whose lease begins at the termination of a prior lease is entitled to the possession as successor to the landlord, and while there may be no privity of contract between the new tenant and the old one, there is privity of estate, and the new tenant has the right to treat the old one as a tenant for a new term. *United Merchants' Realty, etc., Co. v. Roth*, (1908) 193 N. Y. 570, 86 N. E. 544, affirming 122 App. Div. 628, 107 N. Y. S. 511.

Right of re-entry.—By the common law an assignee or grantee of a reversion could not enter for condition broken, except in case of a lease for years; and even under the statute it has been held that the assignee of a part of the reversion cannot re-enter, the condition being entire and not apportionable by the act of the parties. *Van Rensselaer v. Jewett*, (1847) 5 Denio 121, affirmed (1849) 2 N. Y. 141. When a grant in fee was made, depending upon a condition subsequent, no one could re-enter on breach of the condition, except the grantor or his heirs. A conveyance made by the grantor to a third person, either before or after breach of the condition, would not carry with it a right to re-enter for condition broken. This rule, however, did not extend to leases in fee reserving rents, nor to leases for life or years. *Nicoll v. New York, etc., R. Co.*, (1852) 12 Barb. 460, affirmed (1854) 12 N. Y. 121.

Covenant to furnish heat and power.—A covenant to furnish heat and power for demised premises is within the provisions of the section giving a lessee the same remedy against the grantee of his lessor for breach of covenant as he would have had against his immediate lessor. The failure to furnish power and heat affects the use and enjoyment of the premises, and the lessee may maintain an action for the breach against his lessor's grantee where he has attorned to the latter. Such action may be maintained against the grantee for his failure to furnish heat to a new building which, although not erected at the time the lease was drawn, is covered thereby and made part of the demised premises. *Storandt v. Vogel, etc., Co.*, (1910) 140 App. Div. 671, 125 N. Y. S. 568.

Effect of landlord's death.—By the demise of the landlord, leaving several heirs, the rent becomes severed, and each heir may maintain an action on the covenant, to recover the portion of the rent due him. This applies to grants in fee reserving rents. *Cruger v. McLaury*, (1869) 41 N. Y. 219, affirming 51 Barb. 642. And a perpetual annual rent, reserved on a conveyance in fee, passes under a devise of all the testator's tenements and hereditaments. *Van Rensselaer v. Read*, (1863) 26 N. Y. 558.

§ 224. Attornment by tenant. The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either:

1. With the consent of the landlord; or,
2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or,
3. To a mortgagee, after the mortgage has become forfeited.

This section was derived from Real Property Law of 1896, § 194.

Section 224 of the Real Property Law of 1896 is now covered by section 259.

Attornment by lessee to stranger entitled to immediate possession as defense in action for rent: see 18 L. R. A. (N. S.) 396 note.

Subsequent attornment as to land held adversely: see 35 L. R. A. (N. S.) 740 note.

Attornment at common law and under statute.—Although the word “attornment” is still occasionally used in judicial opinions, it is very doubtful whether the thing itself, in the sense in which it existed at common law, survives in this state. Attornment at common law was the acknowledgment by a tenant of a new landlord on the alienation of land and on an agreement to become the tenant of the purchaser. It could take place only when the land was alienated after the execution of the lease; but such attornment is, by virtue of section 223, supra, no longer necessary to create the relation of landlord and tenant. *Commonwealth Mortg. Co. v. De Waltoff*, (1909) 135 App. Div. 33, 119 N. Y. S. 781. The act of attornment, evidenced by the payment of rent to the new owner and its acceptance by him, amounts to an acceptance of the new landlord by the tenant, and an acceptance of the tenancy by the landlord. *Kelley v. Osborn*, (1916) 172 App. Div. 6, 157 N. Y. S. 1100; *Baker v. Citizens' Trust Co.*, (1910) 66 Misc. 622, 121 N. Y. S. 767, affirmed 137 App. Div. 888.

For a comprehensive discussion of attornment, see *Austin v. Ahearne*, (1874) 61 N. Y. 6.

Attornment to stranger.—Following the language of the statute the courts have repeatedly held that the attornment of a tenant to a stranger is absolutely void. *Lawrence v. Brown*, (1851) 5 N. Y. 394.

Attornment under tax title.—One who acquires title to real estate pursuant to a tax sale is not in privity with the former owner, and an attornment by a tenant to such a purchaser is an attornment to a stranger and is, as against the former owner, void. *O'Donnell v. McIntyre*, (1890) 118 N. Y. 156, 23 N. E. 455, affirming 37 Hun 623.

Attornment by tenant to purchaser at foreclosure sale.—A tenant, under a lease subject to a prior mortgage by the owner of the property, who, after foreclosure proceedings, pays rent for several months to the purchaser at the foreclosure sale, thereby effects an attornment within the meaning of the section, and is liable to the purchaser for rent during the balance of the term of the lease. *Kelley v. Osborn*, (1916) 172 App. Div. 6, 157 N. Y. S. 1100.

Attornment to adverse claimant.—A tenant cannot dispute the title of a landlord under whom he has gone into possession, nor claim under any new title until he has renounced the former one, and where the relation of landlord and tenant is established the possession of the tenant is that of the landlord, and the section forbids the tenant from severing the relation by attorning to an adverse claimant. *Merritt v. Smith*, (1899) 27 Misc. 366, 58 N. Y. S. 851, affirmed 50 App. Div. 349, 63 N. Y. S. 1068; *Donnelly v. O'Day*, (1892) 1 Misc. 165, 20 N. Y. S. 688.

Lease after landlord's title taken by eminent domain.—One who leased lands from a former owner in possession knowing that the title thereto had passed to the city of New York on condemnation proceedings had under chapter 724 of the Laws of 1905, authorizing the acquisition of lands in connection with the city water supply, was held liable on the covenant to pay rent until such time as the city saw fit to take possession. The tenant under the circumstances was not relieved from paying rent and was not justified in attorning to the city until it had ousted him and taken possession. *Stewart v. Briggs*, (1910) 138 App. Div. 701, 123 N. Y. S. 803. See also *Phyfe v. Eimer*, (1871) 45 N. Y. 102.

§ 225. Notice of action adverse to possession of tenant. Where a process or summons in an action to recover the real property occupied by him, or the possession thereof, is served upon a tenant, he must forthwith give notice thereof to his landlord; otherwise he forfeits the value of three years' rent of such property, to the landlord or other person of whom he holds.

This section was derived from Real Property Law of 1896, § 195.

Section 225 of the Real Property Law of 1896 is now covered by section 260.

Relation of landlord and tenant as affecting adverse possession: see Code Civ. Pro., § 373.

Possession of tenant as possession of landlord.—Where the relation of landlord and tenant has once been established, the possession of the latter is that of the landlord, and not hostile or adverse. To initiate an adverse holding the tenant must surrender possession to the landlord or do something that is equivalent, and bring home to the landlord knowledge of the adverse claim. *Bedlow v. New York Floating Dry-Dock Co.*, (1889) 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629, reversing 44 Hun 378. See also *Tilyou v. Reynolds*, (1888) 108 N. Y. 558, 15 N. E. 534; *Prevot v. Lawrence*, (1872) 51 N. Y. 219.

Notice of ejectment proceedings.—Ejectment proceedings must be against the party in possession, but if he be a mere tenant he is obliged, under this section, to give notice of the action to his landlord. *Stewart v. Smith*, (1864) 4 Abb. App. Dec. 306.

Application to proceedings for sale to pay debts.—It has been held that the section has no application to a proceeding in the Surrogate's Court to sell land for the payment of debts. *Rigney v. Coles*, (1860) 6 Bosw. 479.

§ 226. **Effect of renewal on sub-lease.** The surrender of an under-lease is not requisite to the validity of the surrender of the original lease, where a new lease is given by the chief landlord. Such a surrender and renewal do not impair any right or interest of the chief landlord, his lessee or the holder of an under-lease, under the original lease; including the chief landlord's remedy by entry, for the rent or duties secured by the new lease, not exceeding the rent and duties reserved in the original lease surrendered.

This section was derived from Real Property Law of 1896, § 196.

Section 226 of the Real Property Law of 1896 is now covered by section 262.

Term "surrender" defined.—A surrender is the restoring and yielding up an estate or interest in lands to one who has an immediate estate in reversion or remainder, and by section 242, *infra*, a term exceeding one year cannot be surrendered, unless by act or operation of law, or by a deed or conveyance in writing. A surrender is implied and so effected by operation of law within the section cited, when another estate is created by the reversioner or remainderman, with the assent of the holder of the term, incompatible with the existing estate or term. In the case of a term for years, or for life, it may be by the acceptance by the lessee or termor of an estate incompatible with the term, or by the taking of a new lease by a lessee. It will not be implied against the intent of the parties, as manifested by their acts; and when such intention cannot be presumed, without doing violence to common sense, the presumption will not be supported. *Coe v. Hobby*, (1878) 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun 157. See also *Schieffelin v. Carpenter*, (1836) 15 Wend. 400; *Van Rensselaer's Heirs v. Penniman*, (1831) 6 Wend. 569. Thus, the taking by a lessee of a new lease of premises during the period of a prior demise, is a virtual surrender of the first lease, and that is the presumption arising from the new lease, because its acceptance is an acknowledgment by the lessee of the right and power of the lessor to make it. But that legal presumption may be overcome, and when the circumstances show that it was not the intention of the parties to make such a surrender the presumption will not be indulged and no surrender will be established. *Alell v. Williams*, (1869) 3 Daly 17. It has been held that a lessor cannot recover against a third person for use and occupation, unless he shows a surrender of the original lease; but a surrender of a lease, and that a third party in possession afterwards held under a distinct and independent agreement with the lessor, may be inferred from circumstances. *Bedford v. Terhune*, (1864) 30 N. Y. 453, 86 Am. Dec. 394, affirming 1 Daly 371.

Surrender by operation of law.—A surrender occurs by operation of law when the parties, without express surrender, do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. Such an implication arises from the facts of the case. *Lewis v. Augermiller*, (1895) 89 Hun 65,

35 N. Y. S. 69. To effect a surrender of an existing lease by a new lease, the new lease must be valid to pass an interest according to the contract and intention of the parties. *Coe v. Hobby*, (1878) 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun 157.

Agreement to sublet.—An agreement by a lessee to convey an interest less than he himself possesses is not an agreement to assign a lease but is an agreement to sublet; and, in the absence of a prohibition against subletting, in the original lease, is enforceable. In such case the consent of the original lessor is unnecessary. *Schenkel v. Lischinsky*, (1904) 45 Misc. 423, 90 N. Y. S. 300. And where the lessee surrenders his lease to the lessor and owner of the fee, the term of a subtenant of the lessee is not affected where he is not a party to the surrender. *Weiss v. Mendelson*, (1898) 24 Misc. 692, 53 N. Y. S. 803.

What notice sufficient to extend lease.—Where a lease for a term of five years contained a provision for an extension thereof for two years, provided the lessee, three months before the expiration of the original term, gave the lessor a written notice of his desire to so extend it, and the lessee served a notice in writing as prescribed, adding that if the lessor chose they would regard the lease as extended two years and a half, and the lessor answered acknowledging the lessee's right to an extension for two years but refused to grant the extension for the extra six months, it was held that the notice was sufficient to extend the term for the two years. *Chamberlain v. Dunlop*, (1891) 126 N. Y. 45, 26 N. E. 966, 22 A. S. R. 807.

§ 227. When tenant may surrender premises. Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender.

This section was derived from Real Property Law of 1896, § 197.

Section 227 of the Real Property Law of 1896 is now covered by **section 263**.

I. In general, 237

II. Construction, 239

III. Applicability in general, 240

IV. Particular causes, 241

I. IN GENERAL

When tenant may be removed: see Code Civ. Pro., § 2231.

Destruction of leased property: see notes, Ann. Cas. 1913A 1095; 22 L. R. A. 613; 25 L. R. A. (N. S.) 609; 33 L. R. A. (N. S.) 540; L. R. A. 1915A 348; L. R. A. 1916F 277

Recovery back of rent paid in advance where property is destroyed: see Ann. Cas. 1912B 117 note; 50 L. R. A. (N. S.) 1034 note.

Effect of passage of prohibitory laws during term of lease of saloon premises: see L. R. A. 1917C 935.

Rule at common law.—At common law the lessee was held by the obligation of his express covenant to pay rent, although the premises had been actually destroyed. *Vann v. Rouse*, (1884) 94 N. Y. 401. See also *Werner v. Padula*, (1900) 49 App. Div. 135, 63 N. Y. S. 68, affirmed without opinion (1901) 167 N. Y. 611, 60 N. E. 1122; *Bacon v. Albany Perforated Wrapping Paper Co.*, (1898) 22 Misc. 592, 49 N. Y. S. 620; *Copeland v. Luttgén*, (1896) 17 Misc. 604, 40 N. Y. S. 653.

Statutory rule.—A lessee or occupant of a building is relieved from the obligation to pay rent in case it is destroyed or rendered untenable by the elements or any other cause without any fault or neglect on his part. In the absence of covenant no obligation rests upon either the landlord or the tenant to rebuild in such case. *Rogers v. Atlantic, etc., Co.*, (1915) 213 N. Y. 246, 107 N. E. 661, Ann. Cas. 1916C 877, L. R. A. 1916A 787, affirming 152 App. Div. 916, 137 N. Y. S. 1140.

Absence of covenant that premises are in good condition.—Where a lease of the whole of an unfurnished dwelling for a definite term contains no covenant on the part of the lessor that the premises are in good condition or that he will put or keep them so, a covenant can not be implied that the building is without inherent defects rendering it unfit for a residence. But where the lessor, knowing at the time of the execution of the lease of the existence of secret defects or conditions rendering the building unfit for a residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, if the lessee abandons the house because thereof he will not be liable for rent subsequently accruing. *Daly v. Wise*, (1892) 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; *Stein v. Rice*, (1898) 23 Misc. 348, 51 N. Y. S. 320.

Covenant by lessee to make repairs.—A covenant by a lessee to make "all inside and outside repairs" imports a general covenant to make ordinary, not extraordinary, repairs, and does not deprive him of the protection of this section. *May v. Gillis*, (1901) 169 N. Y. 330, 62 N. E. 385, reversing 53 App. Div. 393, 66 N. Y. S. 4. Where the keeping of a covenant to repair is not a condition of the covenant to pay rent the failure to keep the former does not justify the tenant in abandoning the premises. *Huber v. Ryan*, (1899) 26 Misc. 428, 56 N. Y. S. 135. See also *Baldwin v. Cohen*, (1909) 132 App. Div. 87, 116 N. Y. S. 510; *Schatzky v. Harber*, (1917) 164 N. Y. S. 610.

Necessity of physical eviction.—A physical eviction is not necessary to exonerate the tenant from payment of rent. Such exoneration follows when the landlord's acts, though not amounting to a physical expulsion, are, nevertheless, of so pronounced and offensive a character as to create a nuisance, which, by preventing the reasonable use by the tenant of the premises, affects directly the consideration of the contract between them. *Sully v. Schmitt*, (1895) 147 N. Y. 248, 41 N. E. 514, 49 A. S. R. 659; *Tallman v. Murphy*, (1890) 120 N. Y. 345, 24 N. E. 716. See also *Humes v. Gardner*, (1898) 22 Misc. 333, 49 N. Y. S. 147; *Lathers v. Coates*, (1896) 18 Misc. 231, 41 N. Y. S. 373.

Effect of surrender of lease.—A surrender of the lease during the term, and its acceptance by the landlord, does not extinguish rights of action already accrued, nor rent in arrears and overdue. *McGregor v. Board of Education*, (1887) 107 N. Y. 511, 14 N. E. 420, reversing 13 Daly 195.

Termination of tenancy at option of tenant.—The termination of the tenancy on the happening of the event provided for is at the option of the tenant. If he elects to avail himself of the provisions of the act, it, by necessary implication, imposes as a condition the surrender of the premises. He cannot retain possession and thus have the benefit of the lease, and at the same time repudiate its obligations. *Johnson v. Oppenheim*, (1873) 55 N. Y. 280, affirming 35 N. Y. Super. Ct. 440; *Copeland v. Luttgen*, (1896) 17 Misc. 604, 40 N. Y. S. 653. See also *Smith v. Kerr*, (1888) 108 N. Y. 31, 15 N. E. 70, 2 A. S. R. 362, affirming 33 Hun 567; *Doupe v. Genin*, (1871) 45 N. Y. 119, 6 Am. Rep. 47, affirming 37 How. Pr. 5, 31 N. Y. Super. Ct. 25; *Danziger v. Falkenberg*, (1892) 64 Hun 635 mem., 18 N. Y. S. 927. The tenant must elect between the alternative choice to surrender or to continue the lease, and an unqualified retention of possession beyond a reasonable period after the destruction of the building will preclude him from recourse to a surrender. *Kelly v. Partridge*, (1893) 4 Misc. 205, 23 N. Y. S. 1027.

Distinction between "renewal" and "extension" of lease.—The distinction between a "removal" and an "extension" of a lease, to the effect that the former prolongs an existing lease without a new instrument, while the latter is strictly a new lease, is not applicable in this state, as a wider scope has been declared for the word "renewal." *Orr v. Doubleday*, (1916) 172 App. Div. 96, 157 N. Y. S. 1009.

Obligation to rebuild.—In the absence of covenants in the lease requiring it to be done, no obligation rests upon either the landlord or tenant to

rebuild. *Rogers v. Atlantic, etc., Co.*, (1915) 213 N. Y. 246, 107 N. E. 661, Ann. Cas. 1916C 877, L. R. A. 1916A 787, affirming 152 App. Div. 916, 137 N. Y. S. 1140; *Smith v. Kerr*, (1888) 108 N. Y. 31, 15 N. E. 70, 2 A. S. R. 362, affirming 33 Hun 567; *Doupe v. Genin*, (1871) 45 N. Y. 119, 6 Am. Rep. 47, affirming 37 How. Pr. 5, 31 N. Y. Super. Ct. 25; *Dehmeyer v. Moses*, (1910) 69 Misc. 476, 127 N. Y. S. 253; *Danziger v. Falkenberg*, (1892) 64 Hun 635 mem., 18 N. Y. S. 927. In such a case the landlord has no right to enter upon the demised premises and take possession, to the exclusion of the tenant, for the purpose of rebuilding. If the tenant, however, makes no objection, it will be deemed a license from him to the landlord to re-enter for the purpose of rebuilding, and when the new structure is completed the tenant has the right to enter into possession thereof and retain it for the term. *Smith v. Kerr*, (1888) 108 N. Y. 31, 15 N. E. 70, 2 A. S. R. 362, affirming 33 Hun 567. See also *Moore v. Coughlin*, (1908) 127 App. Div. 810, 111 N. Y. S. 856.

Rent payable in advance.—If by the terms of a lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed. He is not relieved from that engagement by the fact that the property is destroyed by fire, and is liable to pay the rent due in advance even though the destruction takes place on the very day it falls due. *Werner v. Padula*, (1900) 49 App. Div. 135, 63 N. Y. S. 68, affirmed without opinion (1910) 167 N. Y. 611, 60 N. E. 1122; *Craig v. Butler*, (1894) 83 Hun 286, 31 N. Y. S. 963, affirmed without opinion (1898) 156 N. Y. 672, 50 N. E. 962. See also *Gugel v. Isaacs*, (1897) 21 App. Div. 503, 48 N. Y. S. 594, affirmed without opinion (1900) 162 N. Y. 636, 57 N. E. 1111; *Einstein v. Tutelman*, (1908) 59 Misc. 462, 110 N. Y. S. 1025. And where the rent is payable monthly, in advance, the right of the landlord to recover the same is not affected by an unwarranted abandonment of the premises during the month or by a subsequent surrender or cancellation of the lease. *Cheesebrough v. Lieber*, (1896) 18 Misc. 459, 42 N. Y. S. 1122.

Question of untenability as one of fact.—The question as to what amounts to an untenable condition is essentially one of fact, depending in each case upon the particular circumstances shown. *Lathers v. Coates*, (1896) 18 Misc. 231, 41 N. Y. S. 373; *Zimmer v. Black*, (1891) 59 Hun 626 mem., 14 N. Y. S. 107. And, in an action for rent the question whether the leased premises became untenable without the neglect of the tenant, through "the elements or any other cause," so as to render applicable the statute relieving the tenant from liability for rent, depends upon an inquiry of fact, and is conclusively determined in favor of the tenant by an undirected verdict for him and a unanimous affirmance of the judgment by the Appellate Division. *Meserole v. Hoyt*, (1899) 161 N. Y. 59, 55 N. E. 274, affirming 34 App. Div. 33, 53 N. Y. S. 1072.

Allowance of reasonable time to remove property from premises rendered untenable.—When premises become untenable in consequence of fire, the tenant is entitled to a reasonable time within which to remove his property from the premises occupied by him, and what is a reasonable time for that purpose is a question of fact which must be submitted to the jury and be by them disposed of. *Bassett v. Dean*, (1884) 34 Hun 250.

Counterclaim.—Where a tenant is forced to abandon because of defects in the premises, he is entitled to recover, upon a counterclaim, the value of the premises subsequent to the removal and which he lost by the default of the landlord. *O'Gorman v. Harby*, (1896) 18 Misc. 228, 41 N. Y. S. 521.

II. CONSTRUCTION

Statute as remedial.—The statute is remedial in that it relieves the tenant from the rigorous rule of the common law, which holds him to the payment of rent notwithstanding the building rented may be destroyed or become untenable, and permits him, in such event, to quit and surrender possession of the demised premises. It gives to the tenant the option, when the demised premises are no longer capable of beneficial enjoyment, to terminate and annul the lease, and, by a surrender of the premises, leaves the parties, in respect to the future use and occupation of the same, as if no lease had ever been made. *Johnson v. Oppenheim*, (1873) 55 N. Y. 280, affirming 35 N. Y. Super. Ct. 440; *Copeland v. Luttgen*, (1896) 17 Misc.

604, 40 N. Y. S. 653. But the statute, being in derogation of the common law, must be strictly construed, and by its express provision there must be physical "injury or destruction" of the premises. It is not sufficient that the premises became untenable or unfit for occupancy, but it must be that such untenability or unfitness was due to either destruction or injury. *Floyd-Jones v. Schaen*, (1908) 129 App. Div. 82, 113 N. Y. S. 472; *Majestic Hotel Co. v. Eyre*, (1900) 53 App. Div. 273, 65 N. Y. S. 745; *Younger v. Campbell*, (1916) 158 N. Y. S. 649; *Kent v. Ward*, (1908) 111 N. Y. S. 743.

Effect where term. of lease and statute are similar.—Where the terms of the lease and the provisions of the statute amount to precisely the same thing and have exactly the same meaning, they should receive precisely the same construction. *Werner v. Padula*, (1900) 49 App. Div. 135, 63 N. Y. S. 68, affirmed without opinion (1901) 167 N. Y. 611, 60 N. E. 1122; *Tocci v. Powell*, (1896) 9 App. Div. 283, 41 N. Y. S. 511; *Nimmo v. Harway*, (1898) 23 Misc. 126, 50 N. Y. S. 686; *Bacon v. Albany Perforated Wrapping Paper Co.*, (1898) 22 Misc. 592, 49 N. Y. S. 620.

Relation of section to law of eviction.—This section has nothing to do with the law of eviction. It merely changes a hard rule of the common law by giving a tenant the right or option to quit and surrender possession of the leasehold premises, and thereby release himself for rent accruing after such surrender, where the building which is leased or occupied is destroyed or so injured by the elements, or any other cause, as to be untenable and unfit for occupancy. *Baldwin v. Cohen*, (1909) 132 App. Div. 87, 116 N. Y. S. 510.

III. APPLICABILITY IN GENERAL

General rule.—This section applies in a case where it appears that, by the action of the elements, or other cause occurring during the demised term, the premises became untenable or unfit for occupancy, without any fault or neglect of the tenant. *Meserole v. Hoyt*, (1899) 161 N. Y. 59, 55 N. E. 274, affirming 34 App. Div. 33, 53 N. Y. S. 1072; *Brass v. Rathbone*, (1897) 153 N. Y. 435, 47 N. E. 905, affirming 8 App. Div. 78, 40 N. Y. S. 466; *Sully v. Schmitt*, (1895) 147 N. Y. 248, 41 N. E. 514, 49 A. S. R. 659; *New York Real Estate, etc., Co. v. Motley*, (1894) 143 N. Y. 156, 38 N. E. 103, affirming 3 Misc. 232, 22 N. Y. S. 705; *Tallman v. Murphy*, (1890) 120 N. Y. 345, 24 N. E. 716; *Vann v. Rouse*, (1884) 94 N. Y. 401. It has reference to a destruction or injury resulting from some sudden and unexpected action of the elements or other cause, and not to the gradual deterioration and decay produced by the ordinary action of the elements. It does not affect the common-law rule requiring the tenant to make ordinary repairs. *Suydam v. Jackson*, (1873) 54 N. Y. 450. See also *Oakley v. Loening*, (1894) 8 Misc. 302, 28 N. Y. S. 735.

The section however does not apply to a case where the defect existed when the lease was made and no fraud or misrepresentation is shown on the part of the landlord, or when it results from the neglect of the tenant to make ordinary repairs or from deterioration due to the ordinary use by the tenant. *Meserole v. Hoyt*, (1899) 161 N. Y. 59, 55 N. E. 274, affirming 34 App. Div. 33, 53 N. Y. S. 1072; *Daly v. Wise*, (1892) 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; *Franklin v. Brown*, (1889) 118 N. Y. 110, 23 N. E. 126, 16 A. S. R. 744, 6 L. R. A. 770, affirming 53 N. Y. Super. Ct. 474; *Suydam v. Jackson*, (1873) 54 N. Y. 450; *Cox v. Cryder*, (1915) 168 App. Div. 624, 154 N. Y. S. 452; *Prahar v. Tousey*, (1904) 93 App. Div. 507, 87 N. Y. S. 845; *Sherman v. Ludin*, (1903) 79 App. Div. 37, 79 N. Y. S. 1066; *Lansing v. Thompson*, (1896) 8 App. Div. 54, 40 N. Y. S. 425; *Marks v. Dellaglio*, (1899) 28 Misc. 539, 59 N. Y. S. 509; *Goldberg v. Lloyd*, (1908) 110 N. Y. S. 530.

Abrogation or waiver of statutory provisions.—The provisions of the section may be abrogated or waived by agreement between the parties. In such case the statute has no application, and the rights of the parties depend solely upon the interpretation of the agreement. *Friedlander v. Citron*, (1910) 140 App. Div. 489, 125 N. Y. S. 510; *Roman v. Taylor*, (1904) 93 App. Div. 449, 87 N. Y. S. 655; *Lehmeyer v. Moses*, (1902) 67

App. Div. 531, 73 N. Y. S. 1016, affirmed without opinion (1903) 174 N. Y. 518, 66 N. E. 1111; *Tocci v. Powell*, (1896) 9 App. Div. 283, 41 N. Y. S. 511; *Brewster v. Silverstein*, (1912) 133 N. Y. S. 473; *Stieglitz v. Cohen*, (1910) 66 Misc. 169, 121 N. Y. S. 276. And it is not essential, in order to exclude a lessee from the benefit of the statute, that there should be a covenant in express terms, obligating him to pay rent although the building becomes untenable; it is sufficient if the intention to take away such benefit is clearly shown on the face of the lease or other written agreement, as where it appears that the parties having in mind the contingency mentioned in the statute inserted provisions or covenants inconsistent with the right of surrender. *Butler v. Kidder*, (1881) 87 N. Y. 98. See also *Mehrbach v. Moser*, (1909) 117 N. Y. S. 988; *Nimmo v. Harway*, (1898) 23 Misc. 126, 50 N. Y. S. 686.

IV. PARTICULAR CAUSES

Destruction by fire.—Upon the destruction by fire of a building occupied by a tenant, the relation between a tenant and his landlord is dissolved unless the tenant elects that it shall continue. A notice to the landlord from the tenant of his intention to surrender is not necessary. The tenant is required merely to surrender as soon as reasonable under the circumstances. *Fleischman v. Toplitz*, (1892) 134 N. Y. 349, 31 N. E. 1089, affirming 57 Hun 126, 10 N. Y. S. 471; *Trumbull v. Bombard*, (1916) 171 App. Div. 700, 157 N. Y. S. 794. See also *Decker v. Morton*, (1898) 31 App. Div. 469, 52 N. Y. S. 172, appeal dismissed (1899) 159 N. Y. 572, 24 N. E. 1089. And without a covenant on the part of the landlord to repair, it would seem to be settled law that the landlord is not bound to repair, even in case of injury through fire, and the lessee has the option to surrender the premises or to make the repairs himself. *Sawyer v. Adams*, (1910) 140 App. Div. 756, 126 N. Y. S. 128.

Offensive odors.—In *Tallman v. Murphy*, (1890) 120 N. Y. 345, 24 N. E. 716, which was an action to recover rent of an apartment, it appeared that there was an odor of coal gas which made the tenant sick; that the gas, with smoke, came through the flues from rooms occupied by other tenants; that there were loud explosions day and night, which alarmed the tenants so that they left the premises; and that the explosions came from the water tank on the roof. It was held that the evidence sustained the claim of an eviction and justified the abandonment of the premises under this section. See also *Tallman v. Earle*, (1893) 3 Misc. 76, 23 N. Y. S. 17.

Stench from dead rats.—It has been held that the section was not broad enough to give relief to a tenant where rats died between the walls, and the stench rendered the apartment untenable. *Barnard Realty Co. v. Bonwit*, (1912) 76 Misc. 464, 135 N. Y. S. 700.

Bugs, roaches, and other vermin.—Where the lease of an apartment contained no covenant to keep it free from vermin, in the absence of fraud, deceit, and wrongdoing on the part of the landlord, the fact that the apartment was overrun with water bugs and bed bugs does not constitute a constructive eviction. "The legislative sense of relief to tenants has not as yet reached the ease of rats, mice, bugs, roaches or other vermin, and all questions as to them must be decided according to the wisdom of the common law." *Jacobs v. Morand*, (1908) 59 Misc. 200, 110 N. Y. S. 208.

Vibration caused by electric plant.—This section does not justify a surrender of premises by a tenant because of vibration caused by an adjoining electric plant, with which the lessor had no connection. *Floyd-Jones v. Schaan*, (1908) 129 App. Div. 82, 113 N. Y. S. 472.

Existence of infectious disease.—Where, after the execution of a lease and shortly before the commencement of the term, a person residing in the building was taken sick with an infectious disease, and consequently it would not have been safe or prudent to take young children into the house at the beginning of the term, it was held that this did not, in the absence of an express covenant that the premises would remain free from infectious disease, authorize the lessee to surrender the lease, or relieve him from liability to pay the rent reserved, this section having no application. *Edwards v. McLean*, (1890) 122 N. Y. 302, 25 N. E. 483, affirming 55 N. Y. Super Ct.

126. See also *Majestic Hotel Co. v. Eyre*, (1900) 53 App. Div. 273, 65 N. Y. S. 745.

Failure to furnish heat.—The failure of a landlord to furnish heat has been held to be the basis for a constructive eviction which continued and was renewed after each monthly payment by the tenant. *Perry-Freeman Co., Inc., v. Murphy*, (1917) 164 N. Y. S. 74.

Effect of action by municipal authorities.—Where a landlord was compelled by municipal authorities to make certain structural repairs, which necessitated tearing down and replacing walls of the building, it was held that such repairs rendered the building untenable and that the tenant was justified in surrendering possession under the section. *Warrin v. Haverty*, (1913) 159 App. Div. 840, 144 N. Y. S. 1004. See also *Herald Square Realty Co. v. Saks*, (1915) 215 N. Y. 427, 109 N. E. 545, reversing 157 App. Div. 566, 142 N. Y. S. 808; *Markham v. David Stevenson Brewing Co.*, (1905) 104 App. Div. 420, 93 N. Y. S. 634. But it has been held that this section has no application to a case where premises are directed to be vacated by a municipal department for noncompliance with its orders, except where the condition of untenability arises from direct injury or destruction. *Younger v. Campbell*, (1916) 158 N. Y. S. 649.

When tenant required to make structural repairs directed by state department.—Where a lease in terms provided that the tenant was to conform to and fulfill and perform all present and future obligations and all requirements of law and all present and future ordinances, regulations and lawful requirements of state, municipal and other legal and public authorities now or hereafter existing, it was held that the landlord could not be held liable for the cost of complying with an order of the state department of labor directing the tenant to maintain in the premises a fireproof passageway involving construction work, where such power to issue the order was vested in such department prior to the making of the lease. *Deutsch v. Hoe Estate Co., Inc.*, (1916) 174 App. Div. 685, 161 N. Y. S. 968.

§ 228. Termination of tenancies at will or by sufferance, by notice. A tenancy at will or by sufferance, however created, may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises; which notice must be served, either by delivering to the tenant or to a person of suitable age and discretion, residing upon the premises, or if neither the tenant nor such a person can be found, by affixing it upon a conspicuous part of the premises, where it may be conveniently read. At the expiration of thirty days after the service of such notice, the landlord may re-enter, maintain ejectment, or proceed, in the manner prescribed by law, to remove the tenant, without further or other notice to quit.

This section was derived from Real Property Law of 1896, § 198.

Section 228 of the Real Property Law of 1896 is now covered by section 264.

Notice to be given to tenant at will or by sufferance: see Code Civ. Pro., § 2236.

Right to withdraw notice to quit: see Ann. Cas. 1912D 162 note.

Object of section.—The object of the statute is to furnish to the landlord a more expeditious remedy to recover possession of the demised premises than he could have by the action of ejectment. The principle assumed by the statute is that the tenant whose term expires on a day certain must surrender possession on that day, and that if he refuses the landlord may proceed without delay to obtain the possession. *Rowan v. Lytle*, (1834) 11 Wend. 616.

Tenant defined.—A tenant has been defined to be one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, at will, or upon sufferance. *Powers v. Ingraham*, (1848) 3 Barb. 576. See also *Sims v. Humphrey*, (1847) 4 Denio 185.

When notice not necessary.—When the termination of the lease is fixed and defined, or when the term is for one year, no notice to quit is necessary. *Borbach v. Crossett*, (1892) 64 Hun 637 mem., 19 N. Y. S. 450. See also *People v. Golet*, (1873) 64 Barb. 476. But it has been held that a tenancy from year to year, or so long as both parties shall respectively please, is in one sense a tenancy at will, and must be determined at the end of the year by proper notice. *Post v. Post*, (1852) 14 Barb. 253.

When notice takes effect.—A notice to quit terminates the tenancy on the day the notice expires. *Reeder v. Sayre*, (1877) 70 N. Y. 180, 26 Am. Rep. 567, affirming 6 Hun 562.

Effect of second notice to quit.—It has been held that giving a subsequent notice after the expiration of the first is, in effect, an admission that a tenancy still exists, and is a waiver of the first notice. *Morgan v. Powers*, (1894) 83 Hun 298, 31 N. Y. S. 954.

Tenant under invalid lease.—A tenant in possession under an invalid lease is a tenant at will, and as such is entitled to the notice required by the section before he can be removed. *Carman v. Fox*, (1914) 86 Misc. 197, 149 N. Y. S. 213; *Altschuber v. Lipschitz*, (1909) 113 N. Y. S. 1058. In *People v. Darling*, (1872) 47 N. Y. 666, the tenant occupied the premises for a year, paying the rent monthly, under an agreement void under the statute of frauds. The court held it to be a tenancy from month to month, which could be terminated only by a month's notice to quit. See also *Geiger v. Bracon*, (1876) 6 Daly 506. The mere fact that a person goes into possession under a parol lease, void because for a longer term than one year, does not create a yearly tenancy. The lease of itself is ineffectual to vest any term whatever in the lessee, and when he goes into possession under it, with the consent of the lessor, in the absence of any other agreement, express or implied, he becomes a tenant at will merely, subject to liability to pay, at the rate of the stipulated rent, for the use and occupation. *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 A. S. R. 607, 8 L. R. A. 221. See also *Matter of Sweeney*, (1916) 94 Misc. 617, 159 N. Y. S. 984. But when the circumstances permit the inference of a tenancy from year to year, a party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close, and he can terminate his tenancy only at the end of the current year. *Coudert v. Cohn*, (1890) 118 N. Y. 309, 23 N. E. 298, 16 A. S. R. 761, 7 L. R. A. 69. See also *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 A. S. R. 607, 8 L. R. A. 221.

Effect of holding over.—Where, in consequence of the holding over by a tenant after the expiration of a term of years, his tenancy has become one from year to year, he has the right to quit the premises and terminate the tenancy at the end of any year without giving his landlord previous notice of his intention so to do. *Adams v. Cohoes*, (1891) 127 N. Y. 175, 28 N. E. 25, affirming 53 Hun 260, 6 N. Y. S. 617. So absolute is the implication from holding over, even for a few days, of a renting for another year, that the tenant will not be excused from the payment of rent even where he gives the landlord notice before the end of the term that he does not intend to rent for another year and has rented other premises which will be ready for his occupancy in a few days. *Adams v. Cohoes*, (1890) 127 N. Y. 175, 28 N. E. 25, affirming 53 Hun 260, 6 N. Y. S. 617. See also *Schuyler v. Smith*, (1873) 51 N. Y. 309, 11 Am. Rep. 609. Where one is a tenant for a year under an agreement which does not specify the duration of the occupancy, he cannot be disturbed in his possession until the expiration of the year; but at the expiration of the year the tenancy absolutely terminates and there must be a new agreement, express or implied, to continue the tenancy. Remaining in possession for a considerable period after the expiration of the year, with the landlord's consent, is sufficient to imply a new agreement for another year. *Nowlan v. Trevor*, (1869) 2 Sweeny 67.

As to the effect of holding over under invalid lease, see the next preceding paragraph. *Tenant under invalid lease.*

Effect of surrender by landlord.—The acceptance by the landlord of the surrender of leased premises prevents the recovery of rent not already due, and if the landlord takes possession of such premises so surrendered and relets them to other parties, he will be deemed to have accepted a surrender

unless there are facts rebutting this inference. *Underhill v. Collins*, (1892) 132 N. Y. 269, 30 N. E. 576.

Notice to tenant at will.—One who enters upon lands by permission of the owner without any term being prescribed or rent reserved is a tenant at will, and as such is entitled to one month's notice to quit. *Larned v. Hudson*, (1875) 60 N. Y. 102. And in case of a tenancy at will a notice to quit need not specify the time within which the premises must be surrendered: it is sufficient that the tenant have thirty days' notice in writing of the landlord's intention to terminate the tenancy, and if a time is mentioned which elapses within thirty days of the service of the notice, it is not thereby vitiated. *Burns v. Bryant*, (1865) 31 N. Y. 453. See also *Brown v. York*, (1903) 78 App. Div. 261, 79 N. Y. S. 943, affirmed without opinion (1903) 176 N. Y. 571, 68 N. E. 1115. Thus, where the owner of premises permits another to enter and occupy them without any agreement as to the continuance of such occupation, or any provision as to payment of rent, a tenancy at will or by sufferance is thereby created, and in the case of a tenancy at will the notice to quit need not terminate with the end of the month. *Peer v. O'Leary*, (1894) 8 Misc. 350, 28 N. Y. S. 687.

Assignment by tenant at will or by sufferance.—A tenant at will has no estate that can be granted by him to a third person, and one who enters on land under a lease of assignment from a tenant at will is a disseizor and is liable in trespass at the option of the landlord, and the same rule applies to a tenant by sufferance. *Reekhow v. Schauck*, (1871) 43 N. Y. 448.

Notice to life tenant.—A tenant for life or lives who continues in possession, without the consent of the owner, after the termination of the life estate, is not entitled to notice to quit, as the statute declares him a trespasser, and ejectment without previous notice to quit will lie. A tenancy at sufferance, within the meaning of the statute requiring a month's notice to quit, is not created by such holding over. *Livingston v. Tanner*, (1856) 14 N. Y. 64, reversing 12 Barb. 481. And a lease of lands for a term of years with privilege of renewal given by a life tenant terminates at her death and the remaindermen become entitled to possession, but where after the death of the life tenant and in spite of dispossession proceedings brought by the remaindermen, there being no warrant issued for the removal of the tenant, the latter holds over, the remaindermen as owners may treat him as a trespasser or elect to treat him as a tenant at will, and in such case he is liable for the use and occupation of the premises according to the terms of the prior lease. *Hinton v. Bogart*, (1915) 166 App. Div. 155, 151 N. Y. S. 796.

Notice to tenant from month to month.—In an early case it was held that under a tenancy from month to month neither party was bound to give notice to the other in order to terminate the tenancy at the expiration of any month: that the landlord could remove the tenant by summary proceedings without notice, and that the tenant could lawfully leave the premises at the expiration of any month without notice and without being bound to pay any rent. *Gibbons v. Dayton*, (1875) 4 Hun 451. But in more recent cases it was held that a landlord, in order to terminate an indefinite tenancy from month to month, must give notice to surrender at the end of the month. *Witherbee v. Wykes*, (1913) 159 App. Div. 24, 143 N. Y. S. 1067, modifying and affirming 81 Misc. 474, 143 N. Y. S. 95. See also *Hungerford v. Wagoner*, (1896) 5 App. Div. 590, 39 N. Y. S. 369.

Receipt of part of annual rent.—The payment and receipt of an instalment or aliquot part of the annual rent is evidence of an understanding and goes in support of a yearly tenancy, and without explanation to the contrary is controlling evidence for that purpose. *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 A. S. R. 607, 8 L. R. A. 221.

Cited.—This section was cited in *Rourke v. Metz*, (1910) 139 App. Div. 155, 123 N. Y. S. 720, affirmed (1911) 202 N. Y. 604 mem.

§ 229. Liability of tenant holding over after giving notice of intention to quit. If a tenant gives notice of his intention to quit the premises held by him, and does not accordingly deliver up the possession thereof, at the time specified in such notice, he

or his personal representatives must, so long as he continue in possession, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be recovered at the same time, and in the same manner, as the single rent.

This section was derived from Real Property Law of 1896, § 199.

Section 229 of the Real Property Law of 1896 is now covered by section 265.

Removal of person holding over after sale: see Code Civ. Pro., § 2232.

Holding over generally: see 25 L. R. A. (N. S.) 849 note; L. R. A. 1915A 235 note.

Holding over without formally exercising option to renew: see notes, 6 Ann. Cas. 341; 19 Ann. Cas. 399; Ann. Cas. 1915D 252; 29 L. R. A. (N. S.) 174; L. R. A. 1916E 1232.

Holding over as ratification of lease made during infancy: see 47 L. R. A. (N. S.) 548 note.

Basis of rule.—The rule of law which makes a lessee liable for an additional year where he holds over after the expiration of his term is based on the assumption that the holding over is wrongful, so that the landlord may either treat him as a trespasser or take him as a tenant, but it has no application where the parties anticipated a holding by the tenant beyond the term and provided for it by agreement. *Luger v. Goerke*, (1897) 18 App. Div. 291, 45 N. Y. S. 839. Thus, where a tenant for one or more years holds over after the expiration of his term, the landlord has the option to treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable, and the right of the landlord to elect to continue the tenancy is not affected by the fact that the tenant has refused to renew the lease and has given notice that he has hired other premises. It is not in the power of the tenant alone to throw off the character thus imposed upon him. *Schuyler v. Smith*, (1873) 51 N. Y. 309, 10 Am. Rep. 609. See also *Vosburgh v. Corn*, (1897) 23 App. Div. 147, 48 N. Y. S. 598. Where a tenant for a year or years holds over after the expiration of his term, the law implies an agreement on his part to hold for another year upon the terms of the lease, and the option is with the landlord to so regard it; and this, although he had notice from the tenant before the expiration of the term that he did not intend to remain for another year, at least where the holding over was not unavoidable. *Haynes v. Aldrich*, (1892) 133 N. Y. 287, 31 N. E. 94, 28 A. S. R. 636.

Holding over as question of fact.—There is a class of cases to the effect that the question of whether there has been a holding over by a tenant may become a question of fact. This question has arisen in cases where there was a clear intent to surrender possession, accompanied by negotiations to that end, and the removal of the great bulk of the property from the premises. *Vosburgh v. Corn*, (1897) 23 App. Div. 147, 48 N. Y. S. 598. But where there is no dispute as to the fact that the tenant held over, the only controversy being as to the duration thereof, there is no question for the jury, and the case should be determined by the court. *Oussani v. Thompson*, (1897) 19 Misc. 524, 43 N. Y. S. 1061. Until the relation of landlord and tenant is actually abrogated by some act of both parties to the agreement, or by the issuing of the warrant in dispossess proceedings, the relation of landlord and tenant continues. *Hinton v. Bogart*, (1915) 166 App. Div. 155, 151 N. Y. S. 796.

Burden of proof.—The burden of proof is on the landlord to show that the tenant actually held over. *Frost v. Akron Iron Co.*, (1896) 1 App. Div. 449, 37 N. Y. S. 374.

Renewal of lease by implication.—A tenant holding over from his landlord without leave is liable for rent at the election of the latter on the theory of a renewal of the lease by implication. Owing to the previous relations between the parties the law implies a renewal of the obligations dependent on those relations, which measure every detail of the new contract. The amount of the rent reserved is thus ascertained. *United Merchants' Realty, etc., Co. v. Roth*, (1908) 193 N. Y. 570, 86 N. E. 544, affirming 122 App. Div. 628, 107 N. Y. S. 511. A tenant, by holding over after the expiration of his term, impliedly holds subject to all the conditions of the agreement applicable to his new situation, and this presumption of the common law

inures to the benefit of the heir of the lessor and is in accordance with the rule that the rent follows the reversion. *Hunt v. Wolfe*, (1868) 2 Daly 298; *Johnson v. Doll*, (1895) 11 Misc. 345, 32 N. Y. S. 132.

Effect of new lease.—A landlord can maintain summary proceedings to remove a tenant holding over after the expiration of the term, although he has made a new lease of the premises to begin on the expiration of the term of the tenant in possession, but the tenant under the new lease cannot maintain such proceedings, since the conventional relation of landlord and tenant does not exist between the parties. *Eells v. Morse*, (1913) 208 N. Y. 103, 101 N. E. 803, affirming 142 App. Div. 592, 127 N. Y. S. 438.

Retention of possession caused by illness.—Where a tenant, intending to remove on the expiration of his term, was prevented by being obliged to retain a room for a few days on account of sickness, it was held that such retention was not a holding over within the meaning of the rule which permits the landlord to continue the lease and recover rent for another year. *Herter v. Mullen*, (1899) 159 N. Y. 28, 53 N. E. 700, 70 A. S. R. 517, 44 L. R. A. 703, reversing 9 App. Div. 593, 41 N. Y. S. 708.

Holding over by partnership member.—The fact that a lease for a year of premises owned in common runs to a firm of which one of the tenants in common is a member, does not compel the inference in favor of his cotenant that a continuance in possession after the expiration of the lease is a holding over for another year under the lease, and does not preclude a showing, in avoidance of such an inference, that the lessee tenant in common assumed his relation of owner on the expiration of the lease and permitted his firm to continue in possession temporarily, at a pro rata rental. *Valentine v. Healey*, (1899) 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667, reversing 1 App. Div. 502, 37 N. Y. S. 287.

Effect of subletting.—Where a lessee parts with his whole term it will ordinarily be regarded, as to his landlord, as constituting an assignment of his estate therein, and operates as a surrender of the premises for the term demised. This establishes the relation of the parties as a rule of law where nothing else intervenes, but it can have no application to a case where neither party regards the subletting as having changed the status of the parties; and if the parties thereafter treat the relation as still continuing, and the subtenant continues to hold over the term, it continues the relation of landlord and tenant upon the original terms. *Schwarzler v. McClenahan*, (1899) 38 App. Div. 525, 56 N. Y. S. 611.

Transactions between lessee and third party.—In case a lessee enters into contractual relations with a third party in respect to the subject of the lease, and afterwards obtains a renewal or a new lease, the renewal or the new lease will be deemed an extension of the original term as between the lessee and the third party, if it is necessary for the protection of the rights of such party. In case a lessee mortgages his term for years, and afterwards, instead of obtaining a renewal, takes a new lease for three years, his new lease is subject to the mortgage. *Hansauer v. Dahlman*, (1897) 18 App. Div. 475, 45 N. Y. S. 1088, affirmed without opinion (1900) 163 N. Y. 567, 67 N. E. 1111.

§ 230. Liability of tenant holding over after receiving notice to quit. Where, on the termination of an estate for life, or for years, the person entitled to the possession demands the same, and serves, in the same manner as for the termination of a tenancy at will, a written notice to quit, if the tenant, or any person in possession under him, or by collusion with him, wilfully holds over, after the expiration of thirty days from such service, he must pay to the person so kept out of possession, or his representatives, at the rate of double the yearly value of the property detained, for the time while he so detains the same, together with all damages incurred by the person so kept out by

reason of such detention. There is no equitable defense or relief against a demand accrued, or a recovery had, under this section.

This section was derived from Real Property Law of 1896, § 200.

Section 230 of the Real Property Law of 1896 is now covered by section 266.

When warrant to dispossess cancels lease: see Code Civ. Pro., § 2253.

Redemption by lessee holding over: see Code Civ. Pro., § 2256.

Holding generally: see references under preceding section.

Statutory penalty of double rent or value: see Ann. Cas. 1912A 278 note.

History of section.—The statute is not new but very old. It was first adopted in England (4 Geo. II, chap. 28) and was borrowed by us in 1774. It was re-enacted here in 1788 in the first general revision of English statutes extended to New York. Later it passed through several revisions until it was adopted into the Revised Statutes and thence it passed into the present Real Property Law. *Barson v. Mulligan*, (1908) 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151, reversing 120 App. Div. 878, 105 N. Y. S. 1106.

When statute may be invoked.—The statute may be invoked only on the termination of a tenancy for life or years when a proper notice has been served and the tenant, or any person in collusion with him, wilfully holds over after the expiration of thirty days from the service of the notice. When all these facts exist a special case is presented in which the damages ordinarily recoverable may be doubled. *Barson v. Mulligan*, (1908) 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151, reversing 120 App. Div. 878, 105 N. Y. S. 1106.

Action for use and occupation after notice to vacate.—When a complaint in an action for use and occupation alleges that the tenant, after such notice to vacate, “by and with the consent of the plaintiff used and occupied said premises,” an election to treat the defendant as a tenant is shown, and the recovery is limited to the rental stated in the lease, and when a complaint is framed for use and occupation with the consent of the landlord, without reference to this section, the section is not available in the action. *Stevens v. New York*, (1906) 111 App. Div. 362, 97 N. Y. S. 1062.

§ 231. Lease, when void; liability of landlord where premises are occupied for unlawful purpose. 1. Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.

2. The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business.

Subdivision 1 of this section was derived from L. 1873, ch. 583, § 1; subdivision 2 was derived from the Real Property Law of 1896, § 201.

Section 231 of the Real Property Law of 1896 is now covered by section 267.

When contract to lease void: see *infra*, § 259.

Removal of tenants using premises for game of policy: see PENAL LAW, § 976.

Letting building for lottery purposes: see PENAL LAW, § 1381.

Permitting use of building for opium smoking: see PENAL LAW, § 1533.

Keeping disorderly house: see PENAL LAW, § 1146.

Petition by neighbor of bawdy-house: see Code Civ. Pro., § 2237.

Limitation of leases of agricultural lands: see CONSTITUTION, art. 1, § 13.

Liability of landlord for nuisance: see 50 L. R. A. (N. S.) 288 note.

Joint liability of landlord and tenant for nuisance: see 46 L. R. A. (N. S.) 1189 note.

Criminal liability of landlord for nuisance: see 14 Ann. Cas. 210 note.

Criminal liability of lessor of disorderly house: see 44 L. R. A. (N. S.) 859 note.

Right to recover rent for premises leased for immoral purposes: see notes, 8 Ann. Cas. 181, 21 Ann. Cas. 837; Ann. Cas. 1914B 806.

Purpose of statute.—The statute was intended not only to prevent the use of premises for an unlawful purpose, but to protect the landlord from the consequences of allowing such unlawful purpose to continue. In other words, it gave him the power to put an end to it, and thus to shield himself from any penalty for knowingly permitting the premises to be so used. *People v. Bennett*, (1878) 14 Hun 63. If the lessor of premises knows and intends that they will or may be used for unlawful purposes, the lease is void, and the obligations of the parties will receive no aid from the courts for their enforcement. In such a case it is perfectly competent to show knowledge and intent by circumstantial evidence, for, otherwise, it might be impossible to prove the immoral purposes which underlay an apparently innocent contract of the parties. All that is required is that the evidence adduced shall be fairly susceptible of the inference that the agreement was in furtherance of an unlawful purpose. *Ernst v. Crosby*, (1893) 140 N. Y. 364, 35 N. E. 603.

Illegal sale of liquor.—Where a lease contained a covenant against the sale of intoxicating liquors on the premises, and a sublessee sold such liquors without a license, it was held that such sale was illegal and that the landlord was entitled to the remedy provided by the section. *People v. Bennett*, (1878) 14 Hun 63.

Illegal business conducted by subtenant.—Where a gambling business was conducted by a subtenant and abandoned under apprehension of a criminal prosecution, it was held that such abandonment did not interfere with the landlord's right to maintain summary dispossession proceedings, as the tenant was constructively in possession of the premises until the rendition of final judgment. *Stearns v. Hemmens*, (1888) 14 Daly 501, 21 Abb. N. Cas. 312, 1 N. Y. S. 52, reargument denied 3 N. Y. S. 16, 22 N. Y. St. Rep. 24. A subtenant has no better standing than the original lessee, and must be held to have taken the lease with constructive knowledge of the situation between the owner and the original lessee. *Park Laundry Co. v. Sassone*, (1908) 108 N. Y. S. 725.

Performance prevented by operation of law.—The general rule is that where the law creates a duty and a person without fault on his part is disabled from performing it, failure to perform is excused; but where a party by contract creates a duty upon himself he is bound to make good if he can, notwithstanding any inevitable accident; but the rule has no application where performance becomes impossible by a change in the law or by reason of action taken under governmental authority. Thus where, after a tenement house in the city of New York had been leased for a moving picture show only, the licensing of shows in tenement houses was prohibited by ordinance, neither the lessee nor its surety on the lease was liable for rent accruing thereafter, as the lease could not be performed according to its terms. *Adler v. Miles*, (1910 69 Misc. 601, 126 N. Y. S. 135.

§ 232. Duration of certain agreements in New York. An agreement for the occupation of real property in the city of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of May next after the possession commences under the agreement; and rent thereunder is payable at the usual quarter days, for the payment of rent in that city, unless otherwise expressed in the agreement.

This section was derived from Real Property Law of 1896, § 202.

Section 232 of the Real Property Law of 1896 is now covered by section 268.

When section applies.—It is well settled that this section applies only where there is an agreement for hiring in which the term of the lease remains undetermined. *Kelley v. Osborn*, (1915) 92 Misc. 201, 155 N. Y. S. 451. See also *In re McGovern*, (1908) 118 N. Y. S. 378; *Hebberd v. Mayo*, (1906) 97 N. Y. S. 396; *Laimbeer v. Tailer*, (1889) 51 Hun 639 mem., 4 N. Y. S. 588, 21 N. Y. St. Rep. 380, affirmed without opinion (1891) 125 N. Y. 725, 26 N. E. 756.

In *Wilson v. Taylor*, (1879) 8 Daly 253, there was no agreement as to the terms of hiring, but the tenant had remained in possession six years, paying a monthly rental in advance. It was held that in the absence of any agreement, valid or invalid, as to the duration of the term or as to an annual rental, the rule seemed to be that the intervals between the payments determined the length of the tenancy. See also *Spies v. Voss*, (1890) 16 Daly 171, 9 N. Y. S. 532, 30 N. Y. St. Rep. 548.

Application to monthly tenancy.—This section has no application where the term is fixed by the month. *Olson v. Schevlovitz*, (1904) 91 App. Div. 495, 86 N. Y. S. 834; *Kelley v. Osborn*, (1915) 92 Misc. 201, 155 N. Y. S. 451; *Gilfoyle v. Cahill*, (1896) 18 Misc. 68, 41 N. Y. S. 29.

Agreement to occupy at will of either party.—An agreement to occupy at the will of either party may be attended with uncertainty of duration, but specifies, none the less, the time for which it shall continue, and this section does not apply. *Jennings v. McCarthy*, (1891) 16 N. Y. S. 161. See also *Eart v. McConnell*, (1886) 5 N. Y. St. Rep. 900.

Termination of invalid lease.—An invalid lease of real property in the city of New York terminates under this section on the first day of May next after the occupation commences. *Galewski v. Appelbaum*, (1900) 32 Misc. 203, 65 N. Y. S. 694.

Cited.—This section was cited in *Lawrence v. Goodstein*, (1915) 91 Misc. 19, 154 N. Y. S. 229.

ARTICLE 8

CONVEYANCES AND MORTGAGES

- Section 240. Definitions and use of terms.
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§ 240. Definitions and use of terms. 1. The term "heirs," or other words of inheritance, are not requisite to create or convey an estate in fee.

2. The term "conveyance," as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered.

3. Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.

4. The terms "estate" and "interest in real property" include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent.

This section was derived from Real Property Law of 1896, § 205.

Section 240 of the Real Property Law of 1896 is now covered by section 290.

Terms "real property" and "lands" as used in first eight articles of chapter: see supra, § 2.

Term "conveyance" with reference to recording of instruments affecting real property: see infra, § 290, subd. 3.

Measures of land: see GENERAL BUSINESS LAW, § 3.

Conveyance as evidence: see Code Civ. Pro., § 935.

"Conveyance": see 67 L. R. A. 461 note. *"Conveyance" as including lease:* see Ann. Cas. 1913D 909 note.

"Heirs": see notes, 5 Ann. Cas. 458; Ann. Cas. 1914B 70; Ann. Cas. 1915D 1178; 3 L. R. A. (N. S.) 904; 27 L. R. A. (N. S.) 1158; 29 L. R. A. (N. S.) 970; 30 L. R. A. (N. S.) 593.

"Nearest blood kin": see Ann. Cas. 1915D 725 note.

* L. 1914, ch. 408.

† L. 1916, ch. 313.

Instruments within section.—The rule laid down by the section applies equally to wills or grants. *Heath v. Hewitt*, (1891) 127 N. Y. 166, 27 N. E. 959, 24 A. S. R. 438, 13 L. R. A. 46, affirming 49 Hun 12, 1 N. Y. S. 492; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906.

Omission of term "heirs."—Following the words of the statute the courts have repeatedly held that the term "heirs," or other words of inheritance, are not requisite to create or convey an estate in fee. *Guernsey v. Guernsey*, (1867) 36 N. Y. 267; *Hacker v. Hacker*, (1912) 153 App. Div. 270, 138 N. Y. S. 194; *In re Crofoot*, (1912) 137 N. Y. S. 430. And the omission of the words "heirs or assigns" does not limit the extent of the grant. *Whitney v. Richardson*, (1891) 59 Hun 601, 13 N. Y. S. 861. So, where the language employed in a will is otherwise insufficient to create a life estate, such an estate cannot be implied from the absence of the words "heirs or assigns." *Kirk v. Richardson*, (1884) 32 Hun 434.

Intent as controlling.—A conveyance must be construed so as to give effect to the intent of the parties manifested by the language used, subject to the further rule that when the language is susceptible of more than one interpretation the courts will look to the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the instrument. *Wilson v. Ford*, (1913) 209 N. Y. 186, 102 N. E. 614, reversing 148 App. Div. 307, 133 N. Y. S. 33; *Blackman v. Striker*, (1894) 142 N. Y. 555, 37 N. E. 484; *Knowlton v. Atkins*, (1892) 134 N. Y. 313, 31 N. E. 914, affirming 56 Hun 408, 10 N. Y. S. 77; *Miner v. Brown*, (1892) 133 N. Y. 308, 31 N. E. 34; *Heath v. Hewitt*, (1891) 127 N. Y. 166, 27 N. E. 959, 24 A. S. R. 438, 13 L. R. A. 46, affirming 49 Hun 12, 1 N. Y. S. 492; *Crain v. Wright*, (1889) 114 N. Y. 307, 21 N. E. 401, affirming 36 Hun 74; *Bennett v. Culver*, (1884) 97 N. Y. 250; *Bridger v. Pierson*, (1871) 45 N. Y. 601, reversing 1 Lans. 481; *Ward v. Stanard*, (1903) 82 App. Div. 386, 81 N. Y. S. 906; *De Witt v. Elmira Transfer R. Co.*, (1890) 55 Hun 612 mem., 9 N. Y. S. 149, 5 Silv. Sup. 568, affirmed (1892) 134 N. Y. 495, 32 N. E. 42, 48 N. Y. St. Rep. 320. And if a deed contains a clause clearly showing the intention of the parties ambiguities and inconsistencies in other clauses will not defeat such intention. *Richards v. Crocker*, (1892) 66 Hun 629 mem., 20 N. Y. S. 954, affirmed without opinion (1894) 143 N. Y. 631, 37 N. E. 827. Again, when words have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning. That deeds or other written instruments cannot be varied, enlarged, or restricted by evidence of that character appears from the words of the statute and the general consensus of authority. *Uihlein v. Matthews*, (1902) 172 N. Y. 154, 64 N. E. 792, reversing 57 App. Div. 476, 68 N. Y. S. 309.

Intent as question of law or fact.—The conclusion as to the intent of the parties to an instrument in writing, to be collected from the whole instrument, is rather one of law than of fact, a duty for the court and not for the jury. *Morris v. Ward*, (1867) 36 N. Y. 587.

Construction of testamentary disposition.—In the construction of a testamentary disposition, where the language is unskillful or inaccurate, but the intent can clearly be collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is thereby violated. *Masterson v. Townshend*, (1890) 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816, reversing 57 Super. Ct. 21, 5 N. Y. S. 182.

Construction of easements.—It is a well-established principle of law that an easement in gross will not be presumed where it can fairly be construed to be appurtenant to land. *Wilson v. Ford*, (1913) 209 N. Y. 186, 102 N. E. 614, reversing 148 App. Div. 307, 133 N. Y. S. 33. And only by the use of plain and direct language by a grantor will it be held that he created a right in the nature of an easement attached to one parcel of land, making another servient thereto for all time. *Clark v. Devoe*, (1891) 124 N. Y. 120, 26 N. E. 275, 21 A. S. R. 652, affirming 48 Hun 512, 1 N. Y. S. 132. See also *Uihlein v. Matthews*, (1902) 172 N. Y. 154, 64 N. E. 792, reversing 57 App. Div. 476, 68 N. Y. S. 309.

Creation of joint tenancy.—Joint tenancy, whether in land or personalty, is not favored either in law or equity, and will never be inferred where any other deduction can fairly be made. In consequence survivorship, which is an incident to joint tenancy, is seldom presumed, but the intention to create

a tenancy other than a tenancy in common must be given effect, if such intention can be gathered from the whole instrument, and is consistent with the rules of law. *Perrin v. Harrington*, (1911) 146 App. Div. 292, 130 N. Y. S. 944.

Limitation of general devise.—When an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words creating the estate. *Campbell v. Beaumont*, (1883) 91 N. Y. 464; *Clarke v. Leupp*, (1882) 88 N. Y. 228; *Roseboom v. Roseboom*, (1880) 81 N. Y. 356, affirming 15 Hun 309; *Hacker v. Hacker*, (1912) 153 App. Div. 270, 138 N. Y. S. 194.

Devises by implication.—Courts have, from an early day, repeatedly upheld devises by implication, where no gift of the premises seems to have been made in the will in formal language. *Masterson v. Townshend*, (1890) 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816, reversing 57 Super. Ct. 21, 5 N. Y. S. 182; *Ramsay v. De Remer*, (1892) 65 Hun 212, 20 N. Y. S. 143.

Lease for less than three years.—A lease for a term of less than three years is not a "conveyance" within the meaning of section 935 of the Code of Civil Procedure making a conveyance, acknowledged or proved and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, evidence without further proof thereof. *Goodman v. Greenberg*, (1907) 53 Misc. 583, 103 N. Y. S. 779.

Reformation of conveyance made without consideration.—The fact that lands are conveyed as a gift does not prevent a reformation of the conveyance to conform to the intention of the parties, within the rule laid down by this section. *Matteson v. Johnston*, (1910) 139 App. Div. 859, 124 N. Y. S. 185.

Conditions subsequent.—Conditions subsequent are not favored in law, and to support them as such it must, by the terms used and the apparent circumstances, clearly appear to have been so intended by the parties. *Rose v. Hawley*, (1890) 118 N. Y. 502, 23 N. E. 904. See also *Bennett v. Culver*, (1884) 97 N. Y. 250; *Nicoll v. New York, etc., R. Co.*, (1854) 12 N. Y. 121, affirming 12 Barb. 460.

Construction of exception or reservation.—An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language he should have the benefit of the doubt. They should be taken most strongly and construed most strictly against the grantor whose words they are, or against him who stands in his place, and if an advantage can be gained from an uncertainty or ambiguity in the words the grantee or person standing in his place is entitled to the benefit of it. *Blackman v. Striker*, (1894) 142 N. Y. 555, 37 N. E. 484. The primary rule of construction applicable to a clause in a deed in the form of an exception or reservation is to gather the intention of the parties from the words, by reading not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered. *Blackman v. Striker*, (1894) 142 N. Y. 555, 37 N. E. 484; *Clark v. Devoe*, (1891) 124 N. Y. 120, 26 N. E. 275, 21 A. S. R. 652, affirming 48 Hun 512, 1 N. Y. S. 132.

Effect of general warranty in deed.—A general warranty in a deed not limited by other parts thereof is consistent only with an intention of the grantor to convey the whole estate. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627.

Contracts in derogation of public safety.—Courts will not be astute to sustain contracts when the effect will be to weaken the efficacy of laws and regulations designed for the protection of human life. Where a contract on its face, whether so intended by the parties or not, offends against statutes intended to promote public safety, the courts will not enforce it. *Hart v. City Theatres Co.*, (1915) 215 N. Y. 322, 109 N. E. 497, reversing 156 App. Div. 673, 141 N. Y. S. 386.

Use of term "estate" in devise.—A devise of lands, with power of absolute disposal for the use of the devisee, without anything to qualify the words, is a gift in fee simple. The word "estate" used in a devise refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or

by necessary implication it appears that it was used as descriptive of, or referring to, the corpus of the property, but it may be controlled by other portions of the will. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272.

Cited.—This section was cited in *Glaser v. Burns*, (1915) 154 N. Y. S. 21.

§ 241. Ancient conveyances abolished. The conveyance of real property by feoffment, with livery of seizin, or by fines, or common recoveries, is abolished.

This section was derived from Real Property Law of 1896, § 206.

Section 241 of the Real Property Law of 1896 is now covered by section 291.

Livery of seizin.—Livery of seizin was the investiture or delivery of corporal possession of the land to the feoffee, and was absolutely necessary to complete the gift. It was a corporal transfer of the soil from one man to another, taking effect in presenti or not at all. The feoffee was a principal actor in the transfer and passed at once into the full enjoyment of the fee. *Sparrow v. Kingman*, (1848) 1 N. Y. 242, affirming 12 Barb. 201. But in this state the mode of conveyance by feoffment and livery is abolished, and the name of conveyance by bargain and sale is absorbed in the term grant (1 R. S. 738, §§ 136–138; 739, § 152). *Archer v. Eckerson*, (1896) 10 App. Div. 598, 42 N. Y. S. 137. See also *Moore v. Littel*, (1869) 41 N. Y. 66.

Fines.—“A fine,” says Lord Coke, “is a feoffment (i. e., deed) upon record, called so because *finem imponit litibus*. It puts a finis or end to litigation. Its object is to quiet titles more speedily than by the ordinary limitation of twenty and twenty-five years. By means of this final proceeding, one of two contesting claimants of real estate could compel an assertion or abandonment of the pretensions of his adversary in one-fifth the usual period of delay. The practice of levying fines is as ancient in England, from which country we derived it, as any court of record, and dates back beyond the Conquest. It continued in this state as a mode of conveyancing from its earliest settlement by the English till the year 1830, when with other antiquities it was abolished by the legislature, and a simpler system substituted in its stead.” *McGregor v. Comstock*, (1858) 17 N. Y. 162, affirming 16 Barb. 427. Levying a fine at common law, and as formerly regulated by statute, was a judgment of the court upon the agreement of the parties, which not only transferred the right of the vendor and all claiming under him, but also extinguished the rights of all others who omitted to make their claim in due season. *Jackson v. Smith*, (1816) 13 Johns. 426.

§ 242. When written conveyance necessary. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

This section was derived from Real Property Law of 1896, § 207.

Section 242 of the Real Property Law of 1896 is now covered by section 292.

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I. IN GENERAL

Agreements required to be in writing: see PERSONAL PROPERTY LAW, § 31.

How power may be granted: see *supra*, § 140.

Appeal to Court of Appeals on judgment directing conveyance: see Code Civ. Pro., § 1330.

Transfers and mortgages of interests in decedents' estates to be in writing and recorded: see PERSONAL PROPERTY LAW, § 32.

Buying pretended titles to real property: see PENAL LAW, § 2032.

Transfers of interest in decedent's estate: see *infra*, § 274.

Derivation of statute.—The foundation of this section is the famous English Statute of Frauds (29 Car. II), and in speaking of the section the courts frequently refer to it as the statute of frauds. See *McCartney v. Titworth*, (1907) 119 App. Div. 547, 104 N. Y. S. 45.

II. EXECUTION OF INSTRUMENTS

Execution of power: see *supra*, § 165.

Effect of defective execution of trust power: see *supra*, § 163.

Execution of power to dispose by devise or grant: see *supra*, §§ 167, 168.

By whom conveyance must be acknowledged or proved: see *infra*, § 292.

"Or by his lawful agent."—In order to validate an instrument made by virtue of a power of attorney it must clearly appear that the instrument was made by virtue of specific authority and directions contained in the power. *Matter of Milstein v. Mosher*, (1908) 126 App. Div. 515, 110 N. Y. S. 568; *Lawrence v. Goodstein*, (1915) 91 Misc. 19, 154 N. Y. S. 229. See also *Nestell v. Hart*, (1911) 202 N. Y. 280, 95 N. E. 703, modifying 137 App. Div. 919, 122 N. Y. S. 1138; *Riviera Realty Co. v. Henry*, (1913) 144 N. Y. S. 790. And an agent, in order to execute a lease for more than one year, must have written authority to act. *Finkelstein v. Fabyik*, (1907) 107 N. Y. S. 67.

"Subscribed by the person."—The word "subscribed," as used in the statute, means an actual signing in writing of the name of the party who executes any instrument within the meaning and scope of this section. *Viele v. Osgood*, (1849) 8 Barb. 130; *Champlin v. Parish*, (1845) 11 Paige 405.

Sheriff's sale of lands.—A sheriff's sale of lands is within the statute and requires a deed specifying with certainty the lands sold in order to pass the title. *Jackson v. Catlin*, (1807) 2 Johns. 248, 3 Am. Dec. 415.

Land taken under condemnation proceedings. When condemnation proceedings are taken, and are duly confirmed by the Supreme Court, and the damages paid pursuant to the statute, such proceedings operate as a conveyance notwithstanding the statute of frauds. *Embury v. Conner*, (1850) 3 N. Y. 511, 53 Am. Dec. 325. See also *Matter of Bense*, (1910) 140 App. Div. 257, 125 N. Y. S. 128.

Acceptance by grantee of deed containing covenants.—While under this section deeds conveying lands may be signed and executed by the grantor only, nevertheless if accepted by the grantee, covenants contained therein must be kept by the latter. *Atlantic Dock Co. v. Leavitt*, (1873) 54 N. Y. 35, 13 Am. Rep. 556, affirming 50 Barb. 135; *Thistle v. Jones*, (1904) 45 Misc. 215, 92 N. Y. S. 113.

Church pew.—The sale of a pew in a church is the sale of an interest in real estate; and the contract for its sale, or some note or memorandum thereof expressing the consideration, must be in writing and subscribed by the party by whom the sale is made or his lawfully authorized agent. *Viele v. Osgood*, (1849) 8 Barb. 130; *Ithaca First Baptist Church v. Bigelow*, (1836) 16 Wend. 28.

III. LEASES

When contract to lease is void: see *infra*, § 242.

Parol lease for more than one year.—A lease for a term of more than one year, by parol, is invalid under this section. *Crouse v. Frothingham*, (1884) 97 N. Y. 105, reversing 27 Hun 123; *Joseph H. Davis Bldg. Co. v. Schoenfeld*, (1916) 158 N. Y. S. 727; *Nassoit v. Huber*, (1911) 130 N. Y. S. 143; *Greimel v. O'Connor*, (1909) 119 N. Y. S. 660.

Parol disclaimer of landlord's title.—A parol disclaimer by the tenant of his landlord's title and the assertion that he owns the land in fee, do not work a forfeiture of the term and give the landlord a right of re-entry. *De Lancey v. Ganong*, (1853) 9 N. Y. 9, affirming 12 Barb. 120.

Lease beginning in future.—A lease for one year to take effect in the future need not be in writing. *Ward v. Hasbrouck*, (1902) 169 N. Y. 407, 12 N. E. 434, affirming 52 App. Div. 627, 65 N. Y. S. 200; *Young v. Dake*, (1851) 5 N. Y. 463, 55 Am. Dec. 356, overruling *Croswell v. Crane*, (1849) 7 Barb. 191. See also *Taggard v. Roosevelt*, (1850) 8 How. Pr. 141.

Possession under void lease.—The mere fact that a person goes into possession under a parol lease, void because for a longer term than one year, does not create a yearly tenancy. The lease is ineffectual to vest any term whatever in the lessee, and when he goes into possession under it, with the consent of the lessor, in the absence of any other agreement, he becomes a tenant at will merely, subject to liability to pay, at the rate of the stipulated rent, for the use and occupation. *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 A. S. R. 607, 8 L. R. A. 221. A party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes, by reason of the invalidity of the demise under the statute of frauds, a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close, and he can only terminate his tenancy at the end of the current year. *English v. Marvin*, (1891) 128 N. Y. 380, 28 N. E. 634; *Coudert v. Cohn*, (1890) 118 N. Y. 309, 23 N. E. 298, 16 A. S. R. 716, 7 L. R. A. 69; *Laughran v. Smith*, (1878) 75 N. Y. 295, affirming 11 Hun 311; *Reeder v. Sayre*, (1877) 70 N. Y. 180, 26 Am. Rep. 567, affirming 6 Hun 562; *Karsch v. Kalabza*, (1911) 144 App. Div. 305, 128 N. Y. S. 1027. See also *Wiles v. Cohen*, (1916) 158 N. Y. S. 150. An entry into possession and a payment of rent operates as a new contract for one year, and thus inures as a tenancy from year to year. *Blumenthal v. Bloomingdale*, (1885) 100 N. Y. 558, 3 N. E. 292. See also *Nesbitt v. Thompson*, (1916) 93 Misc. 251, 157 N. Y. S. 166.

Ratification of void lease.—A void lease is incapable of ratification except by a written instrument or some note or memorandum thereof subscribed by the owner of the property. Thus, receiving the rent, even with knowledge of the existence of the lease, does not constitute legal ratification. *Carman v. Fox*, (1914) 86 Misc. 197, 149 N. Y. S. 213; *Long v. Poth*, (1896) 16 Misc. 85, 37 N. Y. S. 670. See also *Larkin v. Radosta*, (1907) 119 App. Div. 515, 104 N. Y. S. 165; *Hall v. Hyle*, (1912) 76 Misc. 71, 136 N. Y. S. 887. But it has been held that where the husband of the owner of real property made a written lease, signed with his own name, and the wife ratified and confirmed it by receiving the rent with knowledge of the facts, she could not afterwards repudiate the lease and treat the tenancy as one from month to month. *Matter of Di Marti*, (1911) 72 Misc. 148, 129 N. Y. S. 81. And also where a lease was executed by the husband of the owner of the land in her presence and with her knowledge and consent, and she witnessed his signature as landlord, it was held that she could not, before the expiration of the term, maintain summary proceedings against the tenant on the theory that the lease was executed without written authority and was, therefore, void, save for the period of one year. *Shimer v. Ronk*, (1910) 139 App. Div. 137, 123 N. Y. S. 479. So, where agents, not authorized by writing, leased premises for a term of five years, and consented to subsequent assignments of the lease, and the principal, with knowledge of the facts, subsequently conveyed the premises during the term by a deed which specifically recognized the existence of the lease, it was held that there was a ratification thereof which would make it a fraud upon the tenant in possession to permit the grantee of the premises, with notice actual and constructive, to evict the tenant or set up an adverse title, whether or not the lease was void because made for a term exceeding one year and executed by an

agent or agents not "thereunto authorized by writing." *Applebaum v. Galewski*, (1901) 34 Misc. 281, 69 N. Y. S. 636.

Option for extension of lease.—An agreement for the leasing of premises for four months with an option for an extension not exceeding three years is not within the statute of frauds. The existence of the option does not render the agreement a lease for a longer period than four months, as it might not be exercised and it is possible for the lease to terminate at the end of the definite period agreed upon, and the statute does not include an agreement, even if it is not likely or is not expected to be performed within a year, if, when fairly and reasonably interpreted, it admits of a valid execution within that time. *Ward v. Hasbrouck*, (1902) 169 N. Y. 407, 62 N. E. 434, affirming 52 App. Div. 627, 65 N. Y. S. 200. But a lease for one year, with the privilege of another year if the tenant so desires, is a hiring for more than one year and void unless in writing. *Hess v. Martin*, (1901) 36 Misc. 541, 73 N. Y. S. 946.

Lease executed by lessee but not by lessor.—It was held in *Laughran v. Smith*, (1878) 75 N. Y. 205, affirming 11 Hun 511, that a lease executed by the lessee but not by the lessor, under which the tenant had gone into possession, was not a valid lease, being for more than a year; and it was further held that the tenancy under such circumstances was only from year to year. See also *Jewett v. Griesheimer*, (1905) 100 App. Div. 210, 91 N. Y. S. 654.

Surrender "by act or operation of law."—A surrender "by act or operation of law" exists only where the new estate accepted by the lessee is created in writing, and such new estate, being created in writing, is regarded as of equal notoriety as a surrender in writing. The doctrine of surrender of an estate for years, by operation of law, has been applied to cases of a mere restoration by the tenant of his possession to the landlord and where the landlord, with the consent of the tenant, grants an estate in the premises to a third person. In such cases, however, there can be no surrender implied in law, without an actual change of the possession. *Lawrence v. Brown*, (1851) 5 N. Y. 394. See also *Crane v. Edwards*, (1903) 80 App. Div. 333, 80 N. Y. S. 747. The question as to what would be effectual as a surrender "by act or operation of law" must be determined according to the rules of common law, inasmuch as a surrender "by act or operation of law" is not within the statute of frauds, but is expressly excepted from it. So, when a surrender "by act or operation of law" is proved according to the common law, it is as effectual a discharge of the lessee as if no statute of frauds existed. *Vandekar v. Reeves*, (1886) 40 Hun 430. And where the parties make another lease valid as a contract, whether by parol or otherwise, inconsistent in terms with the continuance of an existing lease, it operates as a surrender of the latter. *Smith v. Kerr*, (1884) 33 Hun 567, affirmed (1888) 108 N. Y. 31, 15 N. E. 70, 2 A. S. R. 762. And while the unexpired term for a year in a lease for three years may be surrendered by parol, the statute requires a surrender of a lease for a term of more than one year to be in writing and signed by the tenant. *Smith v. Devlin*, (1861) 23 N. Y. 363; *Volkening v. Raymond*, (1915) 91 Misc. 53, 154 N. Y. S. 145; *Baldwin v. Cohen*, (1909) 132 App. Div. 87, 116 N. Y. S. 510.

IV. TRUSTS

Creation of trust.—It is essential, under the statute, that a trust be declared by deed or conveyance in writing, and the trust must exist at the time of the grant, although it may be effectually declared afterwards. *Bates v. Ledgerwood Mfg. Co.*, (1891) 130 N. Y. 200, 29 N. E. 102; *Wright v. Douglass*, (1853) 7 N. Y. 564, reversing 10 Barb. 97; *Matter of Kaupper*, (1910) 141 App. Div. 54, 125 N. Y. S. 878, affirmed (1911) 201 N. Y. 534 mem. See also *Gabriel v. Gabriel*, (1912) 79 Misc. 346, 139 N. Y. S. 778; *Hill v. Warsawski*, (1904) 93 App. Div. 198, 87 N. Y. S. 551. The trust must appear in writing, with absolute certainty as to its nature and terms, before the court can undertake to execute it. *Dillaye v. Greenough*, (1871) 45 N. Y. 438. It has been held that an oral trust may be impressed upon real estate against the trustee when the proof is clear of its existence, but is not enforceable unless it is shown that loss has resulted through mistaken reliance upon the good faith

of the trustee. *Lennon v. Bradley, etc., Co.*, (1899) 27 Misc. 452, 59 N. Y. S. 277, affirmed 46 App. Div. 621 mem., 61 N. Y. S. 370.

Proof of declaration of trust.—It is not necessary to produce a deed or a formal writing intended for the purpose in order to prove the trust, but letters or informal memoranda signed by the party, and even admissions in a pleading in another action between other parties, if signed by the party with knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest. *Hutchins v. Van Vechten*, (1893) 140 N. Y. 115, 35 N. E. 446, affirming 66 Hun 69, 20 N. Y. S. 751. See also *Drovers Deposit Nat. Bank v. Newgass*, (1914) 161 App. Div. 769, 147 N. Y. S. 4; *Hill v. Warsawski*, (1904) 93 App. Div. 198, 87 N. Y. S. 551; *Morgan v. Turner*, (1901) 35 Misc. 399, 71 N. Y. S. 996, affirmed 81 App. Div. 645. And while the writing relied upon must be sufficient to prove the nature and extent of the trust, and cannot be aided by parol evidence, the statute makes no requirement as to the time when the writing shall be made or what becomes of it after it is made. *Cook v. Barr*, (1870) 44 N. Y. 156; *Fagan v. McDonnell*, (1906) 115 App. Div. 89, 100 N. Y. S. 641, affirmed (1908) 191 N. Y. 515 mem.; *McArthur v. Gordon*, (1889) 51 Hun 511, 4 N. Y. S. 584, affirmed without opinion (1891) 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667. Nor is the writing in declaration of the trust required to be under seal. *Corse v. Leggett*, (1857) 25 Barb. 389. But a mere oral declaration of a trust is insufficient under the statute. *McCahill v. McCahill*, (1893) 71 Hun 221, 25 N. Y. S. 219; *Jeremiah v. Pitcher*, (1897) 20 Misc. 513, 45 N. Y. S. 758.

Trustee ex maleficio.—It is well established that a court of equity will not permit the statute of frauds to be used as an instrument of fraud. *Wood v. Rabe*, (1884) 96 N. Y. 414, 48 Am. Rep. 640; *Malins v. Brown*, (1850) 4 N. Y. 403; *Graham v. Graham*, (1909) 134 App. Div. 777, 119 N. Y. S. 1013; *McCartney v. Titworth*, (1907) 119 App. Div. 547, 104 N. Y. S. 45. Thus, one who, by agreement, purchased land at a foreclosure sale for the benefit of the owner of the equity of redemption, at a price below its value, cannot set up the statute of frauds against the party for whom he purchased, as the law holds him to be a trustee ex maleficio. *Ryan v. Dcx*, (1866) 34 N. Y. 307, 90 Am. Dec. 696, reversing 25 Barb. 440. See also *Congregation Kehal, etc., v. Universal Bldg., etc., Co.*, (1909) 134 App. Div. 368, 119 N. Y. S. 72. And courts of equity sometimes, in order to prevent the statute of frauds being used to perpetuate fraud, enforce a parol agreement for the reconveyance of property, and after default in the performance of such parol agreement regard the grantee as a trustee ex maleficio. *Gallagher v. Gallagher*, (1909) 135 App. Div. 457, 120 N. Y. S. 18, affirmed without opinion (1911) 202 N. Y. 572, 96 N. E. 1115. See also *Simis v. Simis*, (1911) 146 App. Div. 655, 131 N. Y. S. 460. Thus, the Court of Appeals in *Wood v. Rabe*, (1884) 96 N. Y. 414, 48 Am. Rep. 640, held that there are two principles upon which a court of equity acts in exercising its remedial jurisdiction: "one is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." See also *McClellan v. Grant*, (1903) 83 App. Div. 599, 82 N. Y. S. 208, affirmed without opinion (1905) 181 N. Y. 581, 74 N. E. 1119. And it is an established rule of equity, that where trust and confidence are imposed by one party in another, and such other accepts the confidence or trust, equity will convert him into a trustee whenever it is necessary to protect the interest of the party so confiding and do justice between them. *Foote v. Foote*, (1870) 58 Barb. 258.

V. AGREEMENTS AND CONTRACTS

When contract to lease or sell void: see infra, § 259

Creation of easement.—An easement is "an estate or interest in real property" and cannot be created by parol agreement. *Mellis v. Munson*, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575; *Norton v. Ritter*, (1907) 121 App. Div. 497, 106 N. Y. S. 129; *Cayuga Railway Co.*

v. Niles, (1878) 13 Hun 170. See also *White v. Manhattan R. Co., (1893) 139 N. Y. 19, 34 N. E. 887; Newman v. Nellis, (1884) 97 N. Y. 285; Day v. New York Cent. R. Co., (1860) 31 Barb. 548.* There is a distinction between an easement and a mere license, and as Chancellor Kent has remarked: "This distinction between a privilege or easement, carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult in some of the cases to discern a substantial difference between them." See also *Borough Bill Posting Co. v. Levy, (1911) 144 App. Div. 784, 129 N. Y. S. 740.* But a license which in its nature amounts to the granting of an estate, for even a short time, is not good without a writing. Thus, a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest which cannot pass without writing, and is within the statute. *Davis v. Townsend, (1851) 10 Barb. 333.*

Right of drainage.—A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred except "by a deed or conveyance in writing." *Wiseman v. Luksinger, (1881) 84 N. Y. 31, 38 Am. Rep. 479.*

Agreement for sale of growing trees.—An agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in lands, and to be valid must be in writing. *Green v. Armstrong, (1845) 1 Denio 550.*

Oral contract to remove buildings.—It has been held that an oral contract to remove buildings standing on land is void, the buildings as they stand being real estate. *Volk v. Olsen, (1907) 54 Misc. 227, 104 N. Y. S. 415.*

Parol agreement to erect dam.—A parol agreement that a party may abut and erect a dam upon lands of another for the permanent creation of water power is void within the statute, as being the transfer of an interest in lands. *Mumford v. Whitney, (1836) 15 Wend. 380, 30 Am. Dec. 60.*

Boundary line agreements.—It has been held that agreements in respect to disputed boundary lines are not within the statute of frauds, as they do not have the effect of a conveyance, so as to pass title from one to the other. To bring such agreement within the operation of the statute it must in effect create, grant, surrender or declare some estate or interest in lands, and be subscribed by the party granting or creating such estate or interest, otherwise it is absolutely void. *Davis v. Townsend, (1851) 10 Barb. 333.*

Oral agreement to purchase lands and convey to another in consideration of improvements.—Although an oral agreement whereby the defendant agreed to purchase certain real estate and convey the same to the plaintiff's wife in consideration of repairs to be made on the property by the plaintiff, was void and unenforceable by the beneficiary in that it was not in writing, it was held that where the promisee actually repaired the premises after their purchase by the promisor he could recover the value thereof on an implied contract to repay. Such implied promise to repay was raised, as the court would not allow the statute of frauds to be made an instrument of fraud. *Graham v. Graham, (1909) 134 App. Div. 777, 119 N. Y. S. 1013.*

Agreement by mortgagee to sell mortgaged premises.—It has been held that an agreement by a mortgagee to sell the mortgaged premises, and after deducting the amount due to himself to pay the surplus to the mortgagor, was not void under the statute of frauds. *Hess v. Fox, (1833) 10 Wend. 436.*

Agreement to purchase mortgage for benefit of mortgagor.—A contract whereby a person agrees to purchase a mortgage and credit the mortgagor with any difference between the sum due and the purchase price and to hold the mortgage until the mortgagor pays the purchase price, is void for lack of consideration if the mortgagor parts with no value and assumes no obligation not already binding upon him as mortgagor and there is no trust or agency between the parties. *Jenkins v. Bishop, (1909) 136 App. Div. 104, 120 N. Y. S. 825, affirmed (1913) 207 N. Y. 697 mem.*

Specific performance of agreements in case of part performance.—While this section and section 259, *infra*, require leases and contracts for leases to be in writing, section 270, *infra*, preserves to equity the power to require specific performance of agreements in case of part performance. *Roedmann v. Hertel, (1912) 78 Misc. 55, 138 N. Y. S. 375.* See also *Murphy v. Whitney, (1893) 69 Hun 573, 23 N. Y. S. 1134, affirmed (1894) 140 N. Y. 541, 35*

N. E. 930, 24 L. R. A. 124, 31 Abb. N. Cas. 86, 56 N. Y. St. Rep. 510. But part performance alone is not sufficient to take every case out of the statute. There must be such a condition that it would be inequitable to refuse specific performance. When the rendition of services is the only performance relied on, it cannot be said that it is inequitable to refuse the decree since the value of the service can ordinarily be estimated. There must be some further consideration rendering it impossible to estimate fair compensation. *Pattat v. Pattat*, (1904) 93 App. Div. 102, 87 N. Y. S. 140.

Parol copartnership for dealing in real estate.—A partnership for dealing in real estate may be created by parol, the question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personalty being incidental to the relation of copartnership. Its disposition is governed by the agreement, express or implied, from the acts of the copartners, and the finding of an intention for a conversion does not conflict either with the spirit or the letter of the statute. *Buckley v. Doig*, (1907) 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. S. 869. See also *Babcock v. Read*, (1885) 99 N. Y. 609, 1 N. E. 141; *Trayshagen v. Burt*, (1876) 67 N. Y. 30; *Williams v. Gillies*, (1878) 75 N. Y. 197, reversing 13 Hun 422; *Chester v. Dickerson*, (1873) 36 App. Div. 63, 55 N. Y. S. 372; *Rosenbaum v. New York*, (1908) 59 Misc. 30, 109 N. Y. S. 775, affirmed 129 App. Div. 351. But though a partnership to deal in real estate may be created by parol, if the agreement also provides for the conveyance of real property from one partner to another or to the copartnership it comes within the statute of frauds and is not enforceable if not in writing. *Pounds v. Eg'ert*, (1907) 117 App. Div. 756, 102 N. Y. S. 1079. Where a fraud is perpetrated by one of the members of such a partnership in the transaction of a partnership enterprise, the statute of frauds presents no obstacle to relief against all the partners, and all are liable, although the others had no connection with or knowledge of the fraud. *Chester v. Dickerson*, (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming 52 Barb. 349.

§ 243. Grant of fee or freehold. A grant in fee or of a freehold estate, must be subscribed by the person from whom the estate or interest conveyed is intended to pass, or by his lawful agent. If not duly acknowledged before its delivery, according to the provisions of this chapter, its execution and delivery must be attested by at least one witness, or, if not so attested, it does not take effect as against a subsequent purchaser or incumbrancer until so acknowledged.

This section was derived from Real Property Law of 1896, § 208.

Section 243 of the Real Property Law of 1896 is now covered by section 293.

Construction of grant of all rights and estate of grantor: see *infra*, § 255.

Conveyance not recorded as void against subsequent purchaser: see *infra*, § 291.

Proof by subscribing witness: see *infra*, § 304.

Seal as presumptive evidence of consideration: see Code Civ. Pro., § 840.

Private seal: see GENERAL CONSTRUCTION LAW, § 44.

Meaning of term "signature": see GENERAL CONSTRUCTION LAW, § 46.

"Must be subscribed."—To "subscribe" means to write one's name beneath or at the end of an instrument. *James v. Patten*, (1851) 6 N. Y. 9, 55 Am. Dec. 376, reversing 8 Barb. 334; *Vielie v. Osgood*, (1849) 8 Barb. 130; *Davis v. Shields*, (1841) 26 Wend. 341; *McGivern v. Fleming*, (1884) 12 Daly 289; *Matter of Griffin*, (1907) 56 Misc. 21, 106 N. Y. S. 24.

Subscribing witness defined.—A subscribing witness is one who was present when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution. The witness need not be present at the moment of execution; if he is called in by the parties immediately afterwards and told that it is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. The execution by the parties

and the subscribing by the witness are then considered as parts of the same transaction. *Hollenback v. Fleming*, (1844) 6 Hill 303.

Validity of unacknowledged deed as between the parties.—It is well settled that the title under an unacknowledged and unattested deed, duly delivered, is good between the parties. This rule is the same both under the statute and at common law. *Strough v. Wilder*, (1890) 119 N. Y. 530, 23 N. E. 1057, 7 L. R. A. 555, affirming 49 Hun 405, 3 N. Y. S. 567; *Hill v. Bartholomew*, (1893) 71 Hun 453, 24 N. Y. S. 944; *Voorhees v. Presbyterian Church*, (1853) 17 Barb. 103. And such deed takes effect, as to prior purchasers and incumbrancers, at the time of its execution. *Wood v. Chapin*, (1856) 13 N. Y. 509, 67 Am. Dec. 62. But it does not take effect as against a subsequent purchaser or incumbrancer until acknowledged. *Roggen v. Avery*, (1872) 63 Barb. 65, affirmed (1875) 65 N. Y. 592.

Effect of deed properly executed upon prior unacknowledged deed.—A grantor who has signed a deed unattested and unacknowledged has still power effectually to convey by deed properly executed, and as against a grantee claiming under such deed the former deed is invalid. *Chamberlain v. Spargur*, (1881) 86 N. Y. 603, affirming 22 Hun 437. See also *Mutual Life Ins. Co. v. Corey*, (1892) 135 N. Y. 326, 31 N. E. 1095, 48 N. Y. St. Rep. 247, reversing 54 Hun 443, 7 N. Y. S. 939. It does not matter upon what consideration or for what purpose the subsequent deed is executed. The first deed does not take effect as against the subsequent purchaser, although the latter has actual notice thereof and is not a purchaser in good faith and for value. *Dunn v. Dunn*, (1912) 151 App. Div. 800, 136 N. Y. S. 282.

Necessity of seal.—It has been held that a seal is no longer necessary on a grant of a fee or freehold, as the statute now requires only that it must be "subscribed by the person from whom the estate or interest conveyed is intended to pass." *Heburn v. Reynolds*, (1911) 73 Misc. 73, 132 N. Y. S. 460; *Leask v. Horton*, (1902) 39 Misc. 144, 79 N. Y. S. 148; *Fitzpatrick v. Graham*, (1903) 122 Fed. 401, 58 C. C. A. 619. But it was formerly held that the record of a deed, to be effectual as evidence of a conveyance of a legal title to the land described, must in some manner represent that the instrument was sealed, and that without the seal the record simply represented a conveyance of the equitable title. *Todd v. Union Dime Sav. Inst.*, (1890) 118 N. Y. 337, 23 N. E. 299.

Effect of covenants of warranty in unacknowledgd deed.—Covenants of warranty in an unattested or unacknowledged deed do not render it operative by way of estoppel as against the subsequent grantee. *Chamberlain v. Spargur*, (1881) 86 N. Y. 603, affirming 22 Hun 437.

When attestation not required.—A deed properly acknowledged by the grantor does not require an attestation by witnesses. *United States Deposit Fund v. Chase*, (1819) 6 Barb. 37.

Meaning of term "purchaser."—The term "purchaser," as used in this section, means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who himself is mediately or immediately a purchaser from such grantor. The word purchase, as designating the origin and nature of title to real property, has a technical but well-settled meaning, and includes every mode of acquisition of an estate in land known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place by operation of law. *Strough v. Wilder*, (1890) 119 N. Y. 530, 23 N. E. 1057, 7 L. R. A. 555, affirming 49 Hun 405, 3 N. Y. S. 567.

Purchaser in good faith under unacknowledged deed.—The statute makes no exception in favor of a purchaser in good faith under an unacknowledged or unattested deed. *Genter v. Morrison*, (1857) 31 Barb. 155. See also *Dunn v. Dunn*, (1912) 151 App. Div. 800, 136 N. Y. S. 282.

Power of receiver in supplementary proceedings to convey.—A receiver appointed in proceedings supplementary to execution takes no such absolute title to real estate as would enable him to convey it when it is subject to the lien of judgments and can be sold under executions issued thereon. *Faneuil Hall Nat. Bank v. Bussing*, (1895) 117 N. Y. 665, 42 N. E. 345, reversing 84 Hun 615, 32 N. Y. S. 1142; *Importers', etc., Nat. Bank v. Quackenbush*, (1894) 113 N. Y. 567, 38 N. E. 728; *Chadrayne v. Gwyer*, (1903) 83 App. Div. 403, 82 N. Y. S. 198.

Conveyance of standing trees.—Standing trees form part of the land, and

as such are real property, and a conveyance thereof falls within the provisions of this section. *Goodyear v. Vosburgh*, (1869) 57 Barb. 243; *Warren v. Leland*, (1848) 2 Barb. 613.

Easement to lay pipe over real property.—An easement to carry water through a pipe across the lands of another for the benefit of the dominant tenement is an interest in fee, or of a freehold estate within the meaning of this section. As against a subsequent purchaser, therefore, of the servient premises, a conveyance of such an easement not acknowledged or attested is invalid, and the fact that the subsequent purchaser had notice, at the time of his purchase, of the conveyance of the easement does not affect his right to treat the conveyance as inoperative. *Nellis v. Munson*, (1888) 108 N. Y. 453, 15 N. E. 739, reversing 24 Hun 575. See also *Clark v. Strong*, (1905) 105 App. Div. 179, 93 N. Y. S. 514.

Transfer of equity of redemption.—The transfer or assignment of an equity of redemption is not "a grant in fee or of a freehold estate." *Stoddard v. Whiting*, (1871) 46 N. Y. 627.

Petroleum and natural gas.—Petroleum oil and natural illuminating gas differ widely from other minerals, as they cannot be blocked out nor conveyed separately, because of their wandering character, and in a sense they cannot be owned until reduced to possession. The right to produce oil, which has been given in lands, has been held not to pass by deed, but to be personal property. *Wagner v. Mallory*, (1902) 169 N. Y. 501, 62 N. E. 584, affirming 41 App. Div. 126, 58 N. Y. S. 526; *Buck v. Cleveland*, (1911) 143 App. Div. 874, 128 N. Y. S. 864.

§ 244. When grant takes effect. A grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery; and all the rules of law, now in force, in respect to the delivery of deeds, apply to grants hereafter executed.

This section was derived from Real Property Law of 1896, § 209.

Section 244 of the Real Property Law of 1896 is now covered by section 294.

Power of appointment not to prevent vesting: see supra, § 41.

Effect of conveyance executed after filing of lis pendens: see Code Civ. Pro., § 1671.

Delivery generally: see 12 L. R. A. 171 note.

Delivery as questions of law or fact: see Ann. Cas. 1914D 108 note.

Admissibility of grantor's subsequent declarations as to delivery: see Ann. Cas. 1916E 713 note.

Delivery to third person: see notes, 54 L. R. A. 865; 9 L. R. A. (N. S.) 224; 38 L. R. A. (N. S.) 941.

Delivery to third person to take effect after grantor's death: see notes, Ann. Cas. 1915C 378; 4 L. R. A. (N. S.) 816; 9 L. R. A. (N. S.) 317.

Deed found in grantor's possession after his death: see notes, Ann. Cas. 1914C 858; 44 L. R. A. (N. S.) 528.

Deposit by grantor for registration: see notes, 7 Ann. Cas. 226; 54 L. R. A. 884; 38 L. R. A. (N. S.) 944.

Validation of undelivered deed by ratification or estoppel: see 9 L. R. A. (N. S.) 945 note.

Necessity of delivery.—A legal title cannot, under any circumstances, vest under a deed before its delivery. *Mitchell v. Bartlett*, (1873) 51 N. Y. 447, affirming 52 Barb. 319.

Necessity of acceptance.—The delivery of a deed without acceptance is nugatory, and the mere taking of an instrument by the grantee, of itself, amounts to nothing, where the circumstances show that he did not receive or hold it as an effective conveyance. The question of delivery, involving acceptance, is always one of intention, depending upon the circumstances of the transaction. *Kochler v. Hughes*, (1896) 148 N. Y. 507, 42 N. E. 1051, affirming 73 Hun 167, 25 N. Y. S. 1061; *Ten Eyck v. Whitbeck*, (1898) 156 N. Y. 341, 50 N. E. 963, reversing 91 Hun 636 mem., 35 N. Y. S. 1013; *Brackett v. Barney*, (1863) 28 N. Y. 333; *Crosby v. Hillyer*, (1840) 24 Wend. 280; *Church v. Gilman*, (1836) 15 Wend. 656, 30 Am.

Dec. 82; *Jackson v. Phipps*, (1815) 12 Johns. 418. And while a deed may be signed, sealed and acknowledged, yet if not actually delivered and accepted, it passes no title. *Jackson v. Leek*, (1834) 12 Wend. 105.

Conclusiveness of delivery on character of title.—Where an absolute delivery was not intended, the grantee has been held to be a mere trustee of the instrument for the grantor. *Brackett v. Barney*, (1863) 28 N. Y. 333.

Delivery as question of intention and fact.—The delivery of a deed is essential to the transfer of title, and there can be no delivery without an acceptance by the grantee. The question of delivery, involving as it does acceptance, is always one of intention, and where there is a conflict in the evidence, it becomes a question of fact to be determined by a jury. *Ten Eyck v. Whitbeck*, (1898) 156 N. Y. 341, 50 N. E. 963, reversing 91 Hun 636 mem., 35 N. Y. S. 1013; *McIlhargy v. Chambers*, (1889) 117 N. Y. 532, 23 N. E. 561, reversing 51 Hun 332, 4 N. Y. S. 698; *Brackett v. Barney*, (1863) 28 N. Y. 333; *Chouteau v. Suydam*, (1860) 21 N. Y. 179; *Genter v. Morrison*, (1857) 31 Barb. 155; *Crain v. Wright*, (1885) 36 Hun 74, affirmed (1889) 114 N. Y. 307, 21 N. E. 401.

Presumption of delivery at date of deed.—In the absence of proof to the contrary, the presumption is that a deed was delivered at its date. *Purdy v. Coar*, (1888) 109 N. Y. 448, 17 N. E. 352, 4 A. S. R. 491, reversing 13 Daly 449; *People v. Snyder*, (1869) 41 N. Y. 397, affirming 51 Barb. 589; *Jackson v. Hill*, (1830) 5 Wend. 532. But this presumption does not hold in relation to unattested and unacknowledged deeds. *Elsley v. Metcalf*, (1845) 1 Denio 323; *Genter v. Morrison*, (1857) 31 Barb. 155.

Record of deed as implying delivery.—While in order to make a deed effective there must be both a delivery and acceptance with the intention that the instrument shall become operative as a conveyance, the recording of the deed may justify a presumption to that effect, and in the absence of proof to repel such presumption, it will prevail. *Ten Eyck v. Whitbeck*, (1898) 156 N. Y. 341, 50 N. E. 963, reversing 91 Hun 636 mem., 35 N. Y. S. 1013; *Adams v. Adams*, (1906) 114 App. Div. 390, 100 N. Y. S. 145, affirmed without opinion (1907) 187 N. Y. 547, 80 N. E. 1104. In *Lawrence v. Farley*, (1881) 24 Hun 293, it was held that in the absence of any evidence to the contrary, the fact that an instrument, duly acknowledged or attested, was found on the record was *prima facie* evidence of its delivery. See also *Munoz v. Wilson*, (1888) 111 N. Y. 295, 18 N. E. 855. But the presumption of delivery of a deed, arising from the fact of its being recorded, is repelled where it appears that the grantee has never been in possession and no claim has ever been made under the deed, that the land is improved and valuable only for its use and occupation, and that the grantor, his heirs and representatives have remained in undisturbed possession for a period of more than forty years without recognizing any rights under the deed. *Knolls v. Barnhardt*, (1877) 7 N. Y. 474. Nor, it has been held, could the presumption of delivery arise from an unauthorized record, made half a century after a deed was executed. *Cusack v. Tweedy*, (1891) 126 N. Y. 81, 26 N. E. 1033, affirming 56 Hun 617, 11 N. Y. S. 16.

Delivery to take effect on death of grantor.—The placing of a deed in the hands of a third party to be delivered to the grantee on the death of the grantor is not a good delivery unless the grantor parts with his dominion over it. It must pass into the hands of the grantee or someone for him in such a way as to be beyond the legal control of the grantor. If the grantor continues till his death to have the right to recall or revoke the deed in the hands of the agent there is no delivery. *Rochester Sav. Bank v. Bailey*, (1901) 34 Misc. 247, 69 N. Y. S. 163, affirmed 70 App. Div. 622, 75 N. Y. S. 1131. See also *Burnham v. Burnham*, (1908) 58 Misc. 385, 111 N. Y. S. 252. But "it is an established rule of law that where the owner of land delivers an instrument, competent in form to grant the land, to a third person, with directions to the third person to hold it during the lifetime of the owner and to deliver it to the person as grantee upon the owner's death, the owner then and there intending to part forever and absolutely with all right to withdraw, cancel, or control the instrument, the owner delivers the instrument as his deed and is immediately and irrevocably bound by the provisions contained in it. Ignorance on the part of the person named as grantee of the transaction does not affect the rule. His acceptance, to the

extent of making inflexible the intention and delivery of the owner, is presumed." *Saltzsieder v. Saltzsieder*, (1916) 219 N. Y. 523, 114 N. E. 856, reversing 167 App. Div. 801, 153 N. Y. 78. So also, a grantor may convey his land and deliver his deed in contemplation of death and to take effect upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment, during his lifetime. *Matter of Seaman*, (1895) 147 N. Y. 69, 41 N. E. 401, reversing 87 Hun 619, 33 N. Y. S. 1134.

Delivery to third person.—The delivery need not be to the grantee in person. It is sufficient that the deed is delivered to a third person for the use and benefit of the grantee. The assent of the grantee to accept the conveyance may be presumed from the fact that the conveyance is beneficial to him. *Diefendorf v. Diefendorf*, (1892) 132 N. Y. 100, 30 N. E. 375; *Church v. Gilman*, (1836) 15 Wend. 656, 30 Am. Dec. 82; *Brown v. Austen*, (1861) 35 Barb. 341. As was said in *Fisher v. Hall*, (1869) 41 N. Y. 416: "It is not necessary that the grantee, or his agent or servant, should be present at the execution in order to have such a delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result." The legal effect of a delivery to a third person is to divest the grantor of his title and transfer it to the grantee by relation as of the date of the delivery to such third person. *Rosseau v. Bleau*, (1892) 131 N. Y. 197, 30 N. E. 52, 27 A. S. R. 578, reversing 60 Hun 259, 14 N. Y. S. 712; *Hathaway v. Payne*, (1865) 34 N. Y. 92. But the evidence must show that the owner intended in the delivery to divest himself of his right to withdraw, revoke or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention. Whether or not the intention existed and was expressed is a question of fact solvable by a consideration of the other facts. While the question as to whether there was a delivery of the instrument, in the legal sense, under a state of facts, is a question of law, it is a question of fact whether the facts, which the law requires to constitute the delivery, exist and are proven. *Saltzsieder v. Saltzsieder*, (1916) 219 N. Y. 523, 114 N. E. 856, reversing 167 App. Div. 801, 153 N. Y. S. 78.

Possession of deed by grantee.—Possession of a deed by the grantee thereunder is presumptive evidence of delivery. *Hoffman v. Hoffman*, (1896) 6 App. Div. 84, 39 N. Y. S. 494.

Conditional delivery.—The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or, as is said, in escrow, and when delivered to a party the delivery operates at once and the condition is unavailable. *Blewitt v. Boorum*, (1894) 142 N. Y. 357, 37 N. E. 119, 40 A. S. R. 600.

Application to mortgages.—The rule laid down by this section as to grants applies equally to mortgages. *Schafer v. Reilly*, (1872) 50 N. Y. 61.

Cited.—This section was cited in *Ray v. Jaeger*, (1909) 131 App. Div. 294, 115 N. Y. S. 737.

§ 245. Estate which passes by grant or devise. A grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom. A greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed; except that every grant is conclusive against the grantor and his heirs claiming from him by descent, and as against a subsequent purchaser or incumbrancer from such grantor, or from such heirs claiming as such, other than a subsequent purchaser or incumbrancer in good faith and for a valuable consideration, who

acquires a superior title by a conveyance that has been first duly recorded.

This section was derived from Real Property Law of 1896, § 210.

Section 245 of the Real Property Law of 1896 is now covered by section 295.

Order and time of recording: see *infra*, §§ 317, 319.

When order for survey may be made: see Code Civ. Pro., § 1682.

Who may devise and what real property may be devised: see DECEDENT ESTATE LAW, §§ 10, 11.

Effect of conveyance upon sale to foreclose mortgage: see Code Civ. Pro., § 1632.

Effect of deed of infant, lunatic, idiot or habitual drunkard: see Code Civ. Pro., § 2358.

Intention of the parties.—A conveyance of land, like all other instruments, should be so construed as to effectuate the intention of the parties, to be ascertained from the language and all the surrounding circumstances. *Blackman v. Striker*, (1849) 142 N. Y. 555, 37 N. E. 484. See also *Clark v. Devoe*, (1891) 124 N. Y. 120, 26 N. E. 275, 21 A. S. R. 652, affirming 48 Hun 512, 1 N. Y. S. 132; *Crain v. Wright*, (1889) 114 N. Y. 307, 21 N. E. 401, affirming 36 Hun 74; *Byrnes v. Baer*, (1881) 86 N. Y. 210; *Myers v. Bell Telephone Co.*, (1903) 83 App. Div. 623, 82 N. Y. S. 83. And yet whatever the intention may be, nothing will pass by a deed except what is described therein. Thus, where a deed contains an accurate description by permanent boundaries, capable of being ascertained, a statement of quantity in the absence of an express covenant that the land granted contains that quantity, and particularly where the words "more or less" are added, cannot enlarge the conveyance. The quantity, being the least certain part of the conveyance, must yield to the boundaries. *Thayer v. Finton*, (1888) 108 N. Y. 394, 15 N. E. 615. And the quantum of an estate intended to be conveyed by a deed must be ascertained from its language. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627.

While the intention of the parties is to be considered, it is settled that nothing will pass by a conveyance except what is described therein, no matter what the intention may have been. *Thayer v. Finton*, (1888) 108 N. Y. 394, 15 N. E. 615; *Coleman v. Manhattan Beach Imp. Co.*, (1883) 94 N. Y. 229, affirming 26 Hun 525; *Matter of New York*, (1917) 99 Misc. 24, 163 N. Y. S. 598.

Attempt to convey larger estate.—The title and estate which passes under a grant or conveyance is commensurate only with that existing in the grantor, although he may undertake to convey, and the deed purports to convey, a larger estate. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627; *Sage v. Cartwright*, (1853) 9 N. Y. 49; *Sparrow v. Kingman*, (1848) 1 N. Y. 242, affirming 12 Barb. 201; *Universal Trust Co. v. Bochauski*, (1912) 75 Misc. 317, 135 N. Y. S. 190; *Perkins v. Storrs*, (1906) 114 App. Div. 322, 99 N. Y. S. 849; *Hinckel v. Stevens*, (1897) 17 App. Div. 279, 45 N. Y. S. 678; *Stoddard v. Weston*, (1889) 53 Hun 634 mem., 3 Silv. Sup. 13, 6 N. Y. S. 34. But where no condition or limitation of the estate is contained in a deed, it passes the whole estate of the grantor. *Heath v. Barmore*, (1872) 50 N. Y. 302, affirming 49 Barb. 496.

Effect of general warranty.—A general warranty in a deed, not limited by other parts thereof, however it technically operates, is consistent only with an intention of the grantor to convey the whole estate. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627.

Distinction between reservation and exception.—It has been held that "a reservation is always of something taken back out of that which is clearly granted, while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent or some right to be exercised in relation to the estate, and as to cut timber upon it." *Craig v. Wells*, (1854) 11 N. Y. 315. See also *Schoonmaker v. Hoyt*, (1896) 148 N. Y. 425, 42 N. E. 1059, reversing 72 Hun 407, 25 N. Y. S. 337; *Myers v. Bell Telephone Co.*, (1903) 83 App. Div. 623, 82 N. Y. S. 83.

Effect of sheriff's deed.—A sheriff's deed given in pursuance of a judgment and sale upon execution is treated as if given by the judgment debtor himself, and conveys precisely what he could have conveyed when the judgment

was docketed. The grantee in such case holds, not under the sheriff, but under the debtor, and the deed when recorded is protected by the recording acts. *Hetzel v. Barber*, (1877) 69 N. Y. 1, reversing in part 6 Hun 534. See also *Beach v. Hollister*, (1875) 5 Thomp. & C. 568.

Gift with power of absolute disposal.—A gift of land with power of absolute disposal, for the use of the devisee, without anything to qualify the words, is a gift in fee simple. *Terry v. Wiggins*, (1872) 47 N. Y. 512, affirming 2 Lans. 272.

Purchaser at mortgage sale under attempted statutory foreclosure.—It is now well settled law in this state that the purchaser at a mortgage sale under an attempted statutory foreclosure, void as against the mortgagor for want of notice, becomes the assignee of the mortgage, and each subsequent grantee becomes in turn an assignee thereof. The reason for this is the provision embodied in the first sentence of this section. *Ketcham v. Deutsch*, (1914) 211 N. Y. 85, 105 N. E. 85, reversing 152 App. Div. 904, 137 N. Y. S. 402.

Mortgagee in possession.—The determination of the question whether a mortgagee who has entered the mortgaged premises with the consent of the owner thereof may be regarded as a mortgagee lawfully in possession, or not, depends upon the facts peculiar to each particular case, which may be considered as falling within one or the other of two general classes. Whenever it appears that the mortgagor has consented, either expressly or impliedly, by contract or conduct, to the entry of the mortgagee for purposes or under circumstances not inconsistent with their relative legal rights under the mortgage, the possession of the mortgagee may properly be regarded as lawful. But, on the other hand, when the entry of the mortgagee is effected with the consent of the mortgagor under a relation that is hostile to, or inconsistent with, the legal rights of the parties under the mortgage, then the mortgagee's possession must stand or fall without reference to his mortgage. *Barson v. Mulligan*, (1908) 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151, reversing 120 App. Div. 879, 105 N. Y. S. 1106.

Ambiguous or imperfect description.—Where the description in a conveyance is ambiguous or imperfect the general provision will be given effect, and the parties will be deemed to have intended to convey what the general description would indicate. But where there is no ambiguity or imperfection in the description, a specific description will control. *Matter of New York*, (1917) 99 Misc. 24, 163 N. Y. S. 598. See also *Thayer v. Finton*, (1888) 108 N. Y. 394, 15 N. E. 615; *Jones v. Smith*, (1878) 73 N. Y. 205; *Grandin v. Hernandez*, (1883) 29 Hun 399.

§ 246. Certain deeds declared grants. Deeds of bargain and sale, and of lease and release, may continue to be used; and are to be deemed grants, subject to all the provisions of law in relation thereto.

This section was derived from Real Property Law of 1896, § 211.

Section 246 of the Real Property Law of 1896 is now covered by section 296. Term "conveyance" as used in article; see supra, § 240, subd. 2.

Certain deeds deemed mortgages; see infra, § 320.

Bargain and sale deed.—A bargain and sale deed is effectual as a conveyance of title. *Long Island R. Co. v. Conklin*, (1864) 29 N. Y. 572, affirming 32 Barb. 381.

Quit claim deed.—A quit claim deed may be used to pass the fee to an estate, or whatever interest or estate the grantor has, whether that of a tenant for life or years or a fee. *Wilhelm v. Wilken*, (1896) 149 N. Y. 447, 44 N. E. 82, 52 A. S. R. 743, 32 L. R. A. 370, affirming 75 Hun 552, 27 N. Y. S. 853.

Mortgage.—A mortgage is an executed conditional transfer of the real estate mortgaged, and in law any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. *Bucklin v. Bucklin*, (1864) 1 Keyes 141, 1 Abb. App. Dec. 242.

§ 247. Conveyance by tenant for life or years of greater estate than possessed. A conveyance made by a tenant for life or years, of a greater estate than he possesses, or can lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant can lawfully convey.

This section was derived from Real Property Law of 1896, § 212.

Section 247 of the Real Property Law of 1896 is now covered by section 297.

Conveyance of larger interest.—A tenant for life or years can, under the statute, convey no greater or larger interest than he actually possesses. *Sparrow v. Kingman*, (1848) 1 N. Y. 242, affirming 12 Barb. 201. But an attempted conveyance of a greater estate does not work a forfeiture, and the heirs, after the conveyance, as before, have no right to the possession during the life of the devisee of the tenant. *Christie v. Gage*, (1877) 71 N. Y. 189, affirming 2 Thomp. & C. 344.

Lease by life tenant.—Where a person is only a life tenant of premises he cannot give a lease for a longer period than the termination of his own life. *Mulligan v. Cox*, (1899) 26 Misc. 709, 56 N. Y. S. 797.

Termination of life estate.—A life estate terminates with the death of the life tenant. *Newcomb v. Lush*, (1895) 84 Hun 254, 32 N. Y. S. 526, affirmed (1898) 155 N. Y. 687 mem.

Construction of statute with respect to remaindermen.—The statute ought not to be construed so as to prevent a reversioner or remainderman from making a conveyance of his estate before he becomes entitled to the possession. But a conveyance after the termination of the particular estate, when the lands are held at the time under claim of an adverse title, is void within the letter and spirit of the statute. *Christie v. Gage*, (1877) 71 N. Y. 189, affirming 2 Thomp. & C. 344. See also *Jackson v. Johnson*, (1825) 5 Cow. 74, 15 Am. Dec. 433. The protection intended to be conferred on the grantee by this section would be illusory if the remainderman, on the theory of a forfeiture of the precedent estate by the conveyance by the owner thereof of the fee, was permitted immediately to enter upon the land. Under the common-law rule the heir was not bound to take advantage of a forfeiture, but might postpone his entry until the death of the tenant for life, and meanwhile the statute did not run against him. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627.

§ 248. Effect of conveyance where property is leased. An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor, by his tenant, before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease.

This section was derived from Real Property Law of 1896, § 213.

Section 248 of the Real Property Law of 1896 is now covered by section 298.

Attornment by tenant: see supra, § 224.

Rights where property or lease is transferred: see supra, § 233.

Origin of attornment.—The matter of attornment had its origin in the feudal system, and is as old as the laws regulating tenure of real property. The restriction was alike on the landlord and the tenant, so that neither without the consent of the other was permitted to substitute another in his place by grant or assignment of the reversion or term. That was founded in the system, and for the reason that the obligation of the lord and vassal

was that of protection and fealty and the relation was in some degree personal. The necessity for the consent of the tenant, which was called *attornment*, to the conveyance of the reversion and to vest in the grantee the rights of the landlord with respect to the lease and term, was wholly done away by 4 Anne C., 16, § 9, which has been made the law of this state. So that there is now no restriction on the right to pass the reversion and all such rights by grant to another. *O'Donnell v. McIntyre*, (1885) 37 Hun 623, affirmed (1890) 118 N. Y. 156, 23 N. E. 455.

Attornment by tenant.—Since the enactment of the statute, attornment by the tenant is unnecessary. *Moffatt v. Smith*, (1850) 4 N. Y. 126.

Attornment to stranger.—Attornment by a tenant to a stranger is absolutely void and cannot affect the possession of his landlord unless made with his consent or pursuant to, or in consequence of, a judgment at law, or the order or decree of a court of equity, or to a mortgagee after the mortgage has become forfeited (see supra, § 224). *O'Donnell v. McIntyre*, (1885) 37 Hun 623, affirmed (1890) 118 N. Y. 156, 23 N. E. 455.

§ 249. Covenants in mortgages. A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.

This section was derived from Real Property Law of 1896, § 214.

Section 249 of the Real Property Law of 1896 is now covered by section 299.

Construction of covenants in mortgages and bonds: see infra, § 254.

Action to foreclose mortgage: see Code Civ. Pro., § 1626 et seq.

Necessity of bond.—The recital in a mortgage of the existence of a bond is evidence of that fact, but is not conclusive. A mortgage is valid although there is no bond, but in the absence of a bond the section confines the remedies of the mortgagee to the lands mentioned and described in the mortgage. *Gaylord v. Knapp*, (1878) 15 Hun 87. See also *Hone v. Fisher*, (1848) 2 Barb. Ch. 559; *Coleman v. Van Rensselaer*, (1873) 44 How. Pr. 368. So, a mortgage executed without a bond, the assignee has no remedy against the mortgagor personally. His only remedy is against the lands mortgaged. *Severance v. Griffith*, (1870) 2 Lans. 38.

Assignment of mortgage without bond.—Under an assignment of a mortgage executed without a bond, the assignee has no remedy against the mortgagor personally. His only remedy is against the lands mortgaged. *Severance v. Griffith*, (1870) 2 Lans. 38.

Mortgage to secure advance.—Where a real estate mortgage without an accompanying bond is given upon an advance of money, in the absence of evidence to the contrary the presumption is that the advance was made upon the terms and conditions contained in the mortgage; and if the mortgage contains no covenant or promise on the part of the mortgagor to pay the moneys advanced, the mortgagee must look to the mortgaged premises alone for reimbursement. *Spencer v. Spencer*, (1884) 95 N. Y. 353.

Instrument not in form of mortgage.—The fact that an instrument is not in form a mortgage is not necessarily conclusive of its character, nor is the further fact that there is no covenant to repay. *Atlantic Trust Co. v. Holdsworth*, (1900) 50 App. Div. 623 mem., 63 N. Y. S. 756, affirmed (1901) 167 N. Y. 532, 60 N. E. 1106.

Admission of indebtedness by mortgagor.—It has been held that an unqualified admission of indebtedness by the mortgagor was equivalent to an express covenant, and that upon such acknowledgment an action might be maintained. But an admission of indebtedness must be made in unequivocal terms, and will not be inferred from the fact that the mortgagor intended, by executing a mortgage, to secure the payment of some debt due to the mortgagee. The debt must be due from the mortgagor to the mortgagee, and it must be collectible without a foreclosure of the mortgage, in order to entitle

the mortgagee to a personal judgment against a mortgagor who has given no bond, and who has not expressly covenanted to pay the amount for which the mortgage is a security. *Smith v. Rice*, (1884) 12 Daly 307; *Elder v. Rouse*, (1836) 15 Wend. 218. But that a personal action can be maintained for a mortgage debt when proved by competent evidence, whether in writing or by parol, cannot be questioned. *Demond v. Crary*, (1882) 9 Fed. 750.

Liability under assumption of mortgage.—The rule in this state is well established that the liability of a grantor for the mortgage debt is essential to the creation of any liability on the part of his grantee. There is no doubt that the general rule is that the assumption of a mortgage in a deed and an agreement to pay the mortgage debt does not render the grantee personally liable for the mortgage debt, unless the grantor was himself so liable when the deed was given. This rule rests on the principle that where the grantor is not bound there is no basis for the promise of the grantee, and the mortgagee can take no advantage of the promise. *Pratt v. Fay*, (1916) 97 Misc. 434, 161 N. Y. S. 412.

Deficiency judgment.—The provisions of this section do not require that an instrument which by its clauses is both a bond and a mortgage, shall contain a covenant for payment of the indebtedness to justify a deficiency judgment. *Katz v. Katz*, (1913) 80 Misc. 170, 140 N. Y. S. 971. See also *Patrick v. Underwood*, (1896) 17 Misc. 646, 40 N. Y. S. 193. And where a mortgage executed by a married woman, which was unaccompanied by a bond or other separate instrument, contained this clause, "This grant is intended as a security for the payment of the sum of \$1,200, money loaned and advanced to said party of the first part, for her benefit and on the credit of her separate estate and property, and said party of the first part hereby charges her separate estate with the payment of said sum," it was held in an action to recover a deficiency arising upon foreclosure of the mortgage that this was not an express covenant to pay, within the meaning of this section. *Mack v. Austin*, (1884) 95 N. Y. 513, affirming 29 Hun 534.

§ 250. Mortgages on real property inherited or devised.

Where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.

This section was derived from Real Property Law of 1896, § 215.

Section 250 of the Real Property Law of 1896 is now covered by section 301.

Mortgages of interest in decedent's estate: see *infra*, § 274.

Sale of real property to pay decedent's debts: see Code Civ. Pro., § 2703 et seq.

Liability of heirs and devisees for debt of decedent: see DECEDENT ESTATE LAW, § 101.

Creditor's action against debtor's next of kin, legatee, heir or devisee: see Code Civ. Pro., § 1837 et seq.

Rule at common law.—The statute abrogates the common-law rule, which was that the devisee of real property upon which subsisted any incumbrance put upon it during the testator's lifetime, was entitled to have such incumbrance satisfied out of the personal assets of the testator's estate. This rule was broad enough to include a mortgage, and only in cases where an intention to make the devised estate the primary fund for the payment of incumbrances was plainly manifested did the devisee take his devise *cum onere*. *Matter of Noyes*, (1885) 3 Dem. 369.

General rule.—The burden of paying a mortgage made by a testator or ancestor is by the terms of this section laid upon the devisee or heir. *Matter of Hun*, (1895) 144 N. Y. 472, 39 N. E. 376; *Pease v. Egan*, (1892) 131 N. Y. 262, 30 N. E. 102; *Van Vechten v. Keator*, (1875) 63 N. Y. 52; *Halsey v.*

Reed, (1842) 9 Paige 446; *Sutherland v. Rose*, (1866) 47 Barb. 144. So the mortgage must be paid off by those who are entitled to the real estate on which it is a lien. *House v. House*, (1843) 10 Paige 158. Thus, where no proof is made that the mortgaged premises did not descend to the heir, the statute requires the heir to satisfy the mortgage of his ancestor or testator without resort to the administrator or executor. *Matter of Roberts*, (1911) 72 Misc. 625, 132 N. Y. S. 396.

Object of statute.—The object and intention of the statute was to make the premises charged with the mortgage the primary fund for the payment of the debt in all cases as between the heir or devisee and the personal representatives of the testator or intestate who had assumed the payment of the debt, except where the decedent by his will had made a different provision for such payment. In other words, the object of the statute was to abrogate the rule which in certain cases compelled the personal representatives of the decedent to pay off incumbrances upon his real estate for the benefit of the heir or devisee of such real estate. *Halsey v. Reed*, (1842) 9 Paige 446; *Roosevelt v. Carpenter*, (1858) 28 Barb. 426. Thus, the object of the statute is not to deprive the mortgagee of any part of his debt, where the real estate on which it is a specific lien is insufficient to pay the whole of the debt, including the necessary expense of foreclosure. All he can ask for, however, either at law or in equity, is that the balance of his debt, beyond the value of the real estate on which it is a lien, shall be paid out of the personal estate pro rata with the claims of other creditors. And that pro rata allowance should not be computed upon the whole mortgage debt, but only upon that part of it which is equitably chargeable upon the personal property. In other words, so much of the debt as can be raised out of the mortgaged premises is to be considered as if it had been paid by the heirs at law, or by the decedent before his death. And the mortgagee is to come in pro rata with the other creditors as to the residue of the debt, including what has already been paid by the administrators out of the personal estate. *Johnson v. Corbett*, (1844) 11 Paige 265. See also *Mollan v. Griffith*, (1832) 3 Paige 402; *Rice v. Harbeson*, (1873) 2 Thomp. & C. 4, affirmed (1875) 43 N. Y. 493. But before the mortgagee can resort to the personal estate of the testator he must first exhaust his remedy against the land, and look to the general estate of the bondsman only for the deficiency. *Olmstead v. Latimer*, (1896) 9 App. Div. 163, 41 N. Y. S. 44, modified on other grounds (1899) 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685. See also *Erwin v. Loper*, (1871) 43 N. Y. 521. The reason of the statute was undoubtedly that, though legally the mortgage is collateral to the debt, yet it is ordinarily thought of as the principal thing. The legislature saw that a testator devising property which was subject to a mortgage would usually intend that the devisee should take the land with the burden, and would not intend, unless he so expressly stated, that his personal property should be used to relieve the land. The legislature thus gives to a will the effect which the testator undoubtedly would intend. *Cochrane v. Hawver*, (1889) 54 Hun 556, 7 N. Y. S. 907.

Meaning of term "ancestor."—The term "ancestor" has been said more properly to apply to the possessor of an estate than to an ancestor of a family, and in this sense it is generally employed in the treatment of descents of real property. *Matter of Kene*, (1894) 8 Misc. 102, 29 N. Y. S. 1078.

General direction to pay debts.—A general direction in a testator's will to his executors "to pay all just and legal demands against his estate," is insufficient to charge the personal estate with mortgage debts. *Carpenter v. Carpenter*, (1892) 131 N. Y. 101, 29 N. E. 1013, 27 A. S. R. 569; *Wells v. Wells*, (1892) 30 Abb. N. Cas. 225, 24 N. Y. S. 874; *Rapalye v. Rapalye*, (1857) 27 Barb. 610; *Robinson v. Robinson*, (1869) 1 Lans. 117. And where the only direction in a will was to pay debts it was held that such was not an express direction to pay an existing mortgage on the real property thereby devised. *Ring v. Woolley*, (1913) 155 App. Div. 817, 140 N. Y. S. 648.

"An express direction."—The provision that mortgages are not a charge upon the general estate, but that the devisee must take subject thereto, will not be disturbed unless by a clear and express direction in the will. *De Graaf v. Cochrane*, (1897) 21 App. Div. 381, 47 N. Y. S. 502; *Matter of*

Hopkins, (1890) 57 Hun 9, 10 N. Y. S. 264; Sutherland v. Gesner, (1882) 27 Hun 282; Taylor v. Wendel, (1857) 4 Bradf. 324; Rapalye v. Rapalye, (1857) 27 Barb. 610. But the section expressly permits a testator to direct that mortgages upon his realty shall be paid from his personality. Matter of Berry, (1897) 23 Misc. 230, 51 N. Y. S. 1132. And a devise that property be "free of any mortgage," with a further specific direction to pay off, requires a construction that calls upon executors to discharge mortgages out of the general estate. Clark v. Goodridge, (1906) 51 Misc. 140, 100 N. Y. S. 824. See also Alexander v. Powell, (1884) 3 Dem. 152.

Measure of heir's liability.—This section does not contemplate that the devisee or heir shall be liable irrespective of the property which descended to him, but rather that his liability to pay the mortgage shall be measured by and not exceed the value of such property. Hauselt v. Patterson, (1891) 124 N. Y. 349, 26 N. E. 937, modifying 51 Hun 321, 4 N. Y. S. 772.

Payment of mortgages before legacies.—The statute requires the payment of mortgages before any legacies can be paid. In re Williams, (1853) 1 Redf. 208.

Application to promissory note.—The statute has no application to a promissory note given by a decedent, and an heir or devisee has the right to have the same paid out of the personal assets of the estate. Wright v. Holbrook, (1865) 32 N. Y. 587, affirming 2 Robt. 516.

Mortgage as charge upon remainder.—Where a devise of real estate, and "all the rents, issues and profits thereof," was made to the testator's widow for life, with remainder to the residuary legatees of his personality, the latter to be applied to the payment of debts, such debts as could not be paid thereby to remain a charge on the real estate, "to be paid therefrom after the life estate of my wife therein," with directions to the executor to defer the payment of certain mortgages on the real estate, during the lifetime of the widow, or to make loans for the payment thereof, secured by mortgage on said real estate, to be paid therefrom after her decease, it was held that the mortgages were charged upon the estate in remainder, in exoneration of the life estate. Moseley v. Marshall, (1860) 22 N. Y. 200.

Mortgage kept alive as muniment of title.—This section refers to a mortgage which is an actual lien upon the property, and not to one which is simply kept outstanding as a muniment of title. Browne v. Ferris, (1889) 23 Abb. N. Cas. 226, 7 N. Y. S. 172, affirmed 56 Hun 601, 11 N. Y. S. 97, 32 N. Y. St. Rep. 170.

Mortgage upon undivided interest for benefit of cotenant.—Where the will of a cotenant contained only the usual clause that his debts and funeral expenses be paid, it was held that a devisee by the acceptance of a devise became primarily liable to satisfy a mortgage as between himself and his cotenant. Ring v. Woolley, (1913) 155 App. Div. 817, 140 N. Y. S. 648.

Effect of wife's omission to join in mortgage.—Where the husband mortgages property after his wife has acquired an inchoate right of dower therein, and she does not join in the mortgage, the heirs at law or devisees of the husband must pay off the entire amount of the incumbrance. House v. House, (1813) 10 Paige 158.

Blending of realty and personality.—It has been held that the statute is applicable to cases where the same person takes the realty and personality as a blended fund. Matter of Livingston, (1896) 1 App. Div. 568, 37 N. Y. S. 463.

Payment of interest.—The payment of interest which accrues after the death of an ancestor or testator is the obligation of the heir or devisee, and not that of the estate. Matter of Roberts, (1911) 72 Misc. 625, 132 N. Y. S. 396. See also Matter of Watson, (1905) 101 App. Div. 550, 92 N. Y. S. 195; Matter of Stiles, (1909) 64 Misc. 658, 120 N. Y. S. 714.

Mortgage as dependent on debt.—A mortgage is collateral to and the mere incident of the debt, and depends upon the subsisting vitality of it. Murray v. Fox, (1886) 39 Hun 108, affirmed (1887) 104 N. Y. 382, 10 N. E. 864; Roosevelt v. Carpenter, (1858) 28 Barb. 426.

Personal representatives as parties to foreclosure action.—Where the mortgagor or other party personally liable for the deficiency in a foreclosure suit is dead, his personal representatives may be made parties to the action to enable the plaintiff to obtain a decree that the deficiency be paid out of the estate in their hands in the due course of administration. Glacius v. Fogel, (1882) 88 N. Y. 434, affirming 25 Hun 227.

Statute of limitations.—A payment on a mortgage, made after the death of the mortgagor, by his heirs who have inherited part of the mortgaged premises, to protect their title, does not arrest the running of the statute of limitations as against the lien of the mortgage upon another part of the premises which were conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty as regards the mortgage, and was under no obligation to pay the mortgage debt. A payment to arrest the running of the statute must be made by a party to, or who is bound to pay, the obligation, or by one who is in fact or in law his authorized agent. *Murdock v. Waterman*, (1895) 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, reversing 71 Hun 320, 25 N. Y. S. 120.

§ 251. Covenants not implied. A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not.

This section was derived from Real Property Law of 1896, § 216.

Section 251 of the Real Property Law of 1896 is now covered by section 302.

Covenants in mortgages: see *supra*, § 249.

Meaning of statute.—It has been said that "the fair meaning of this statute is that no obligation, covenant, or promise to do or pay anything shall be implied against either party to such conveyance, from the conveyance itself." *Murray v. Smith*, (1853) 1 Duer 412.

General rule.—Following the rule laid down by the statute, the courts have uniformly held that no covenant is implied in a conveyance of land. *Coffin v. Brooklyn*, (1889) 116 N. Y. 159, 22 N. E. 227; *Read v. Erie R. Co.*, (1884) 97 N. Y. 341; *Sandford v. Travers*, (1869) 40 N. Y. 140, modifying 7 Bosw. 498; *Bradt v. Church*, (1886) 39 Hun 262, affirmed (1888) 110 N. Y. 537, 18 N. E. 357; *Garlock v. Lane*, (1852) 15 Barb. 359. But it has been said that parties may doubtless enter into covenants collateral to the deed. *Clark v. Post*, (1889) 113 N. Y. 17, 20 N. E. 573, reversing 45 Hun 265, 10 N. Y. St. Rep. 425. Or there may be a conveyance without any covenants, either express or implied. *Ramsay v. Wandell*, (1884) 32 Hun 482.

Quitclaim deed.—As a quitclaim deed contains no covenants, none will be implied. *Bradt v. Church*, (1886) 39 Hun 262, affirmed (1888) 110 N. Y. 537, 18 N. E. 357; *Pierce v. Fuller*, (1885) 36 Hun 179.

Executor's deed without covenants.—On the foreclosure of a mortgage given for the purchase money, simultaneously with a conveyance by the mortgagee, who is an executor, containing no covenants except against the acts of himself and his testator, it was held to be no defense that a portion of the property was, at the time, covered by an incumbrance not existing through or imposed by any act or omission specified in the covenant. *Sandford v. Travers*, (1869) 40 N. Y. 140, modifying 7 Bosw. 498.

Application to mortgages.—It has been held that the provisions of this section apply equally to mortgages as to conveyances. *Stoddard v. Weston*, (1889) 53 Hun 634 mem., 3 Silv. Sup. 13, 6 N. Y. S. 34.

Implied warranty in contract for sale of lands.—In every contract for the sale of lands there is an implied warranty on the part of the vendor that he has a good title to that which he assumes to sell, unless such warranty is expressly excluded by the terms of the contract. That implied warranty exists so long as the contract remains executory, but on the delivery of the deed the law throws upon the purchaser the responsibility of protecting himself by suitable express covenants, and he must look to those alone. *Leggett v. Mutual Life Ins. Co.*, (1873) 53 N. Y. 394, reversing 64 Barb. 23; *Burwell v. Jackson*, (1854) 9 N. Y. 535.

Application of section to leases.—A lease is not a conveyance of real estate within the meaning of this section. *New York v. Mabie*, (1855) 13 N. Y. 151, 64 Am. Dec. 538, reversing 2 Duer 401. Nor does the statute apply to leases for years. In such cases a covenant for quiet enjoyment is ordinarily implied, but where a lease contains an express covenant for quiet enjoyment without molestation or disturbance from the lessor, his successors, or assigns, no other or further covenant in respect to enjoyment will be implied.

Burr v. Stenton, (1871) 43 N. Y. 462, affirming 52 Barb. 377. See also **Vernam v. Smith**, (1857) 15 N. Y. 327; **Moffat v. Strong**, (1861) 9 Bosw. 57; **Tone v. Brace**, (1845) 11 Paige 566. The law will not imply a covenant in a lease as to conditions not under the control of the lessor, and with reference to which he and the lessee being ignorant, neither could be supposed to have contracted. **Franklin v. Brown**, (1889) 118 N. Y. 110, 23 N. E. 126, 16 A. S. R. 744, 6 L. R. A. 770, affirming 53 Super. Ct. 474. See also **Graves v. Berdan**, (1863) 26 N. Y. 498, affirming 29 Barb. 100.

A lease in fee or in perpetuity is a conveyance of real property, and if it contains no covenants none will be implied. **Carter v. Burr**, (1862) 39 Barb. 59.

§ 252. Lineal and collateral warranties abolished. Lineal and collateral warranties, with all their incidents, have been abolished; but the heirs and devisees of a person, who has made a covenant or agreement, are answerable thereon, to the extent of the real property descended or devised to them, in the cases and in the manner prescribed by law.

This section was derived from Real Property Law of 1896, § 217.

Section 252 of the Real Property Law of 1896 is now covered by section 303.

Liability of heirs and devisees for debt of decedent: see DECEDENT ESTATE LAW, § 101.

Action on contract in case of death of party liable: see Code Civ. Pro., § 758.

Ancient doctrine of collateral warranty.—The ancient doctrine of collateral warranty was where the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title, on the presumption that he might thereafter have assets by descent from or through the ancestor, and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. This form of warranty was considered a grievous one and was therefore abolished by statute. **Trolan v. Rogers**, (1895) 88 Hun 422, 34 N. Y. S. 836.

Liability of heirs and devisees.—The statute makes the heirs and devisees liable for all debts and covenants of the ancestor, to the extent of the land descended to them, but the heir is not liable for the debts of the ancestor until a deficiency of the personal estate is shown, or the remedy against the personal representatives exhausted. **Hill v. Ressegieu**, (1852) 17 Barb. 162.

Duty of heirs to fulfill contract of decedent.—The heirs of a vendor are bound to fulfill his contract to convey, to the extent of the estate that descends to them, and although not named in the contract. **Hill v. Ressegieu**, (1852) 17 Barb. 162.

§ 253. Construction of covenants in grants of freehold interests. In grants of freehold interests in real property, the following or similar covenants must be construed as follows:

1. **Seizin.**—A covenant that the grantor "is seized of the said premises (described) in fee simple, and has good right to convey the same," must be construed as meaning that such grantor, at the time of the execution and delivery of the conveyance, is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance.

2. Quiet enjoyment.—A covenant that the grantee “shall quietly enjoy the said premises,” must be construed as meaning that such grantee, his heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same.

3. Freedom from incumbrances.—A covenant “that the said premises are free from incumbrances,” must be construed as meaning that such premises are free, clear, discharged and unincumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and incumbrances, of what nature or kind soever.

4. Further assuance.—A covenant that the grantor will “execute or procure any further necessary assurance of the title to said premises,” must be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, or in trust for him or them, shall and will at any time or times thereafter upon the reasonable request, and at the proper costs and charges of the grantee, his heirs, successors and assigns, make, do, and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended to be, in and to the grantee, his heirs, successors or assigns forever, as by the grantee, his heirs, successors or assigns, or his or their counsel learned in the law, shall be reasonably advised or required.

5. Warranty of title.—A covenant that the grantor “will forever warrant the title” to the said premises, must be construed as meaning that the grantor and his heirs, or successors, the premises granted, and every part and parcel thereof, with the appurtenances, unto the grantee, his heirs, successors, or assigns, against the grantor and his heirs or successors, and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and forever defend.

6. Grantor has not incumbered.—A covenant that the grantor “has not done or suffered anything whereby the said premises have been incumbered,” must be construed as meaning that the grantor has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may

be impeached, charged or incumbered in any manner or way whatsoever.

This section was derived from Real Property Law of 1896, § 218.

Section 253 of the Real Property Law of 1896 is now covered by section 304.

- I. In general, 275**
- II. Seizin, 276**
- III. Quiet enjoyment, 277**
- IV. Freedom from incumbrances, 278**
- V. Further assurance, 279**
- VI. Warranty of title, 280**

I. IN GENERAL

Penalty for using long forms of covenants: see *infra*, § 327.

Measures of land: see GENERAL BUSINESS LAW, § 3.

When order for survey may be made: see Code Civ. Pro., § 1682.

Limitation of action for breach of covenant of seizin or against incumbrances: see Code Civ. Pro., § 381.

Words of conveyance as importing warranty.—It has been regarded as settled in this state that neither the word grant, bargain, sell, alien, nor confirm when used in a conveyance of real estate, imports a warranty. *Burwell v. Jackson*, (1854) 9 N. Y. 535.

Estate essential to support covenants.—The legal possession of land which is sufficient to carry the covenants upon a conveyance must be a right or interest in the nature of property, valid at all events against all extraneous intrusion and capable of the same kind of transfer and devolution as other property. *Mygatt v. Coe*, (1895) 147 N. Y. 456, 42 N. E. 17, reversing 83 Hun 612, 31 N. Y. S. 1130.

Effect of general warranty.—A general warranty in a deed, not limited by other parts thereof, however technically it may operate, is consistent only with an intention of the grantor to convey the whole estate. *Thompson v. Simpson*, (1891) 128 N. Y. 270, 28 N. E. 627.

When covenant runs with the land.—A covenant relating to real estate runs with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land, but a covenant does not run with the land unless it is of such a nature as to bind not merely the parties thereto but also their grantees or successors in interest. *Kidder v. Port Henry Iron Ore Co.*, (1911) 201 N. Y. 445, 94 N. E. 1070, affirming 142 App. Div. 920, 127 N. Y. S. 1127.

Covenants running to heirs and assigns.—The fact that a covenant runs to the grantee, "his heirs and assigns," does not dispense with the necessity of privity of estate in order to carry the covenants with the land, and the mere employment of these words will not make a covenant which in its nature or otherwise is personal run with the land. *Mygatt v. Coe*, (1895) 147 N. Y. 456, 42 N. E. 17, reversing 83 Hun 612, 31 N. Y. S. 1130. No covenant in regard to real estate will run with the land unless the obligee in the covenant has some interest in the land to which the covenant can be attached and with the conveyance of which it will pass. *Wilmurt v. McGraue*, (1897) 16 App. Div. 412, 45 N. Y. S. 32.

Covenant to build fences.—It has been held that a covenant to build fences is an affirmative one and runs with the land. *Concklin v. New York Cent., etc., R. Co.*, (1912) 149 App. Div. 739, 134 N. Y. S. 191.

Covenant to join association.—A covenant whereby a grantee "for herself, her heirs and assigns," agreed to become a member of an association organized by her grantor, and to conform to its rules, was held to be a mere personal covenant, and not running with the land so as to be binding upon her grantees. *Rochelle Park Assn. v. Ensinger*, (1910) 138 App. Div. 81, 122 N. Y. S. 556.

Party wall agreement.—An agreement for the present extension of a party wall is not such an incumbrance as will prevent a party thereto from conveying a good title to a third person; although the rule seems to

be otherwise where the agreement contemplates such an extension by either party in the future. *Hayden v. Pinchot*, (1916) 172 App. Div. 102, 158 N. Y. S. 215.

Recovery by prior grantee.—An earlier grantee of the land who has parted with his title cannot recover against his covenantor until himself compelled to respond on his own covenants to his grantee. *Clarke v. Priest*, (1897) 21 App. Div. 174, 47 N. Y. S. 489.

Construction of covenants generally.—There is no different rule applicable to the construction of a covenant in a deed than that which governs in the construction of any other instrument. The intention of the parties is the controlling principle of interpretation, if that can fairly be spelled out of the instrument. *Matteson v. Johnston*, (1910) 139 App. Div. 859, 124 N. Y. S. 185. In an action for a breach of covenant the plaintiff must stand on the deed itself; but in construing a deed, all other deeds to which it refers, and which refer to each other, should be considered. *Riegel v. Larnard*, (1917) 164 N. Y. S. 763.

Restrictive covenants created for benefit of property retained by grantor.—Restrictive covenants in a deed of conveyance, created for the benefit of property retained by the grantor, are enforceable only by him or his grantees who own the property benefited by the covenant against the owners of the property burdened thereby. *Moore v. Henderson*, (1917) 99 Misc. 344, 163 N. Y. S. 761.

Mutuality of restrictive covenants.—Restrictive covenants entered into by various grantees pursuant to a general plan, on the theory of mutuality, are enforceable by the several grantees against each other. *Moore v. Henderson*, (1917) 99 Misc. 344, 163 N. Y. S. 761.

II. SEIZIN

When seizin within twenty years necessary in action to recover real property: see Code Civ. Pro., § 365.

Breach of ordinary covenant of seizin: see notes, Ann. Cas. 1913B 1184; 48 L. R. A. (N. S.) 619; 51 L. R. A. (N. S.) 428.

Nature of covenant of seizin.—A covenant of seizin is a covenant in praesenti, and if broken at all is broken the instant it is made. In this respect it is unlike the covenant of warranty, which is necessarily a prospective covenant, a covenant the breach of which can occur only some time after the conveyance is made. The former is a personal covenant, while the latter is binding upon and runs with the premises conveyed, and a covenant of seizin is not a covenant against incumbrances. *Hebler v. Brown*, (1896) 18 Misc. 395, 41 N. Y. S. 441. Covenants of seizin and of right to convey, in a deed of real estate executed by one who has no title, are broken by the delivery of the deed and become choses in action; they do not run with the land and so, do not pass to subsequent grantees, without an assignment of the cause of action. *Mygatt v. Coe*, (1891) 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646, reversing 44 Hun 31, 8 N. Y. St. Rep. 434; *Bingham v. Weidewax*, (1848) 1 N. Y. 509; *Veit v. McCauslan*, (1913) 157 App. Div. 335, 142 N. Y. S. 281, affirmed (1914) 213 N. Y. 678 mem.; *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158; *Roberts v. Levy*, (1867) 3 Abb. Pr. (N. S.) 311. And the covenant is broken if the grantor at the time of the conveyance does not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself. Accordingly, where the grantor covenanted in the conveyance that he was the lawful owner of the premises and seized of a good and indefeasible inheritance therein, and a quantity of rails erected into a fence standing on the premises was the property of another person by virtue of a previous agreement made with the grantor, it was held that the grantee might maintain an action against the grantor for a breach of the covenant of seizin. *Mott v. Palmer*, (1848) 1 N. Y. 564.

Purchase of outstanding title.—Under a covenant of seizin an outstanding title may be purchased at the expense of the covenantor, but not mere evidence of existing title in the covenantee. *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158.

Allegation of breach.—In a complaint for breach of a covenant of seizin, it is sufficient to allege the breach by negating the words of the covenant. *Veit v. McCauslan*, (1913) 157 App. Div. 335, 142 N. Y. S. 281, affirmed (1914) 213 N. Y. 678 mem.

Proof of breach.—In order to recover under a covenant of seizin the plaintiff must show a failure of title. *Hilliker v. Rueger*, (1916) 219 N. Y. 334, 114 N. E. 391, reversing 165 App. Div. 189, 151 N. Y. S. 234. But in an action for breach of a covenant of seizin, proof of eviction or ouster is not essential to the recovery of damages. *Shattuck v. Lamb*, (1875) 65 N. Y. 499, 22 Am. Rep. 656; *Hilliker v. Rueger*, (1914) 165 App. Div. 189, 151 N. Y. S. 234; *Veit v. McCauslan*, (1913) 157 App. Div. 335, 142 N. Y. S. 281, affirmed (1914) 213 N. Y. 678 mem.

III. QUIET ENJOYMENT

Undivided interest of tenant in common as breach: see Ann. Cas. 1913B 847 note. *Existence of highways, etc., as breach:* see 48 L. R. A. (N. S.) 619 note. *Water right as breach:* see 51 L. R. A. (N. S.) 428 note.

Construction of covenant generally.—Every covenant for quiet enjoyment becomes a subject for construction by the court according to its terms and the intention of the parties. *Paddell v. Janes*, (1915) 90 Misc. 146, 152 N. Y. S. 948.

Covenant as running with the land.—A covenant of quiet enjoyment is a covenant running with the land. *Utica, etc., R. Co. v. Gates*, (1896) 8 App. Div. 181, 40 N. Y. S. 316. But privity of estate is essential to carry covenants of warranty and quiet enjoyment to subsequent grantees in order to support a right of action by them against the original covenantor, when there is an eviction by paramount title. Legal possession of land, though the lowest interest or title that a person can have, is an estate therein, capable of being conveyed, and when conveyed creates a sufficient privity of estate between grantor and grantee to carry the covenants of warranty and quiet enjoyment through successive conveyances to a remote grantee. *Mygatt v. Coe*, (1895) 147 N. Y. 456, 42 N. E. 17, reversing 83 Hun 612, 31 N. Y. S. 1130; *Cassada v. Stobel*, (1904) 98 App. Div. 600, 90 N. Y. S. 533. See also *Clarke v. Priest*, (1897) 21 App. Div. 174, 47 N. Y. S. 489. Covenants of warranty and of quiet enjoyment entered into jointly by the owner of the fee and a stranger to the title, who does not assume any title in himself or right to convey, do not run with the land as against the stranger, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from a breach of the covenants. *Mygatt v. Coe*, (1891) 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646, reversing 44 Hun 31, 8 N. Y. St. Rep. 434.

Necessity of eviction or ouster.—There can be no dispute that the covenant for quiet enjoyment can be broken only by an eviction, actual or constructive, from the premises conveyed, or some portion thereof. This is not a merely technical rule, having no foundation in principle or justice, but has its foundation in the reason that the covenantee, who has obtained possession, should not be permitted to recover for breach of the covenant for a mere failure or defect of title, so long as he is left in possession, as he may never be disturbed and thus never suffer damage. The covenantor should, however, be held liable, not only in all cases coming technically within the letter of the rule, but also in all cases falling really within its reason. It has, therefore, been held that where the covenantee has not been able to obtain the possession of the premises conveyed on account of a paramount outstanding title he may, though never ousted from the possession, maintain an action for the breach of the covenant. *Scriven v. Smith*, (1885) 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224, affirming 30 Hun 129; *Shattuck v. Lamb*, (1875) 65 N. Y. 499, 22 Am. Rep. 656. See also *Mahoney v. Simms*, (1914) 86 Misc. 484, 148 N. Y. S. 1069; *Kidder v. Bork*, (1895) 12 Misc. 519, 33 N. Y. S. 663; *Whitbeck v. Cook*, (1818) 15 Johns. 483, 8 Am. Dec. 272; *Gardner v. Keteltas*, (1842) 3 Hill 330, 38 Am. Dec. 637. Nevertheless, the covenant for quiet and peaceable possession goes to the possession only and not to the title, and is broken only by actual entry and ouster, or expulsion from or disturbance in the possession. *Cassada v. Stobel*, (1904) 98 App. Div. 600, 90 N. Y. S. 533; *Clarke v. Priest*, (1897) 21 App. Div. 174, 47 N. Y. S. 489. And where at the time of the grant there was an apparent easement over adjoining lands belonging to another, but not necessarily attached as an appurtenance to the land conveyed, and to which the grantor

had no title or right, it was held that an interruption of the use thereof by the adjoining owner did not make the grantor liable under covenants of warranty and quiet enjoyment, although the grant was "with appurtenances." *Green v. Collins*, (1881) 86 N. Y. 246, 40 Am. Rep. 531, reversing 20 Hun 474.

Effect of mere trespass.—A covenant of warranty and of quiet enjoyment or against incumbrances in a deed is not broken by a mere trespass, not amounting to an eviction, committed without claim of right on the part of the trespasser. *Horton v. Bauer*, (1891) 129 N. Y. 148, 29 N. E. 1.

IV. FREEDOM FROM INCUMBRANCES

What constitutes breach: see notes, Ann. Cas. 1912D 1119, 1140; Ann. Cas. 1913B 873, 1065; Ann. Cas. 1913E 248; Ann. Cas. 1914D 1011, 1176; Ann. Cas. 1915D 865; Ann. Cas. 1916B 586; 30 L. R. A. (N. S.) 835; 36 L. R. A. (N. S.) 314; 48 L. R. A. (N. S.) 619; 51 L. R. A. (N. S.) 428.

Incumbrance defined.—An incumbrance, within the terms of the covenant against incumbrances, is said to be every right to or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance; and the breach of such a covenant takes place at the instant the conveyance is made. *Huyck v. Andrews*, (1889) 113 N. Y. 81, 20 N. E. 581, 10 A. S. R. 432, 3 L. R. A. 789; *Doonan v. Killilea*, (1914) 87 Misc. 427, 149 N. Y. S. 832.

Covenant as running with the land.—A covenant against incumbrances runs with the land and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered. *Geiszler v. De Graaf*, (1901) 166 N. Y. 339, 59 N. E. 993, 82 A. S. R. 659, affirming 44 App. Div. 178, 60 N. Y. S. 651. See also *Andrews v. Appel*, (1880) 22 Hun 429.

Outstanding easement.—That the covenant against incumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this state, and there is no hint in any of them that knowledge by the grantee of the existence of the easement at the time of the conveyance makes any difference. Thus the existence of an easement authorizing another to dam up and use the waters of a stream upon lands conveyed is a breach of a covenant against incumbrances, and knowledge on the part of the grantee at the time of the conveyance or notice to him of the existence of the easement is no defense to an action for the breach. *Huyck v. Andrews*, (1889) 113 N. Y. 81, 20 N. E. 581, 10 A. S. R. 432, 3 L. R. A. 789. See also *Sriever v. Smith*, (1885) 100 N. Y. 471, 3 N. E. 675, 53 A. S. R. 224, affirming 30 Hun 129.

Effect of warranty where portion of land conveyed was public highway.—The rule that where a portion of land conveyed with covenant of warranty was at the time of conveyance a public highway, and used as such, this is not a breach of the warranty, rests upon the presumption arising from the opportunity furnished the purchaser by the apparent existence or use of the highway to take notice of it, and in such case he is charged with knowledge and is to be presumed to have purchased with reference thereto. The rule does not apply where, at the time of the conveyance, there was no indication or notice, actual or constructive, of the existence of a highway or public easement. In such a case where there is a subsequent appropriation for a highway by the public in the exercise of a pre-existing right, of a portion of the land conveyed, this is a breach of the covenant. *Ilymes v. Esley*, (1889) 116 N. Y. 501, 22 N. E. 1087, 15 A. S. R. 421.

Outstanding taxes.—No tax or assessment is a lien or incumbrance within the meaning of a covenant against them until the amount thereof is ascertained or determined. *Harper v. Downey*, (1889) 113 N. Y. 644, 21 N. E. 63; *Lathers v. Keogh*, (1888) 109 N. Y. 583, 17 N. E. 131, affirming 39 Hun 576; *Doonan v. Killilea*, (1914) 87 Misc. 427, 149 N. Y. S. 832; *Ryan v. Domestic Realty Co.*, (1914) 85 Misc. 449, 147 N. Y. S. 974. Thus, a covenant in a deed that the premises conveyed were "then free from incumbrances," was held not broken by the fact that at the date of the delivery of the deed the premises were subject to an assessment for a local improvement which had not been fully confirmed and an entry thereof made in the

proper office. *New York City Real Estate Corp. v. Harper*, (1903) 174 N. Y. 123, 66 N. E. 660, modifying 70 App. Div. 64, 74 N. Y. S. 1065.

Remedy of wife against husband's incumbrance.—Where a husband conveyed to his wife by a deed containing a covenant against incumbrances, when in fact he had incumbered the property by a purchase money mortgage, it was held that the wife, after his death, was entitled to maintain an action against his estate for breach of the covenant. *King v. Union Trust Co.*, (1911) 148 App. Div. 110, 133 N. Y. S. 18, affirmed (1913) 208 N. Y. 566 mem.

Executors' deed.—Where, upon the foreclosure of a mortgage given for the purchase money simultaneously with a conveyance by the mortgagees who were executors, containing no covenants except against the acts of themselves and their testator, it was held to be no defense that a portion of the property was, at the time, covered by an incumbrance not existing through, or imposed by, any act or omission specified in the covenant. *Sandford v. Travers*, (1869) 40 N. Y. 140, modifying 7 Bosw. 498.

Purchaser at foreclosure sale.—As to whether the purchaser of mortgaged premises, at a sale upon foreclosure, is in privity with the mortgagor, so as to be bound by his grants and covenants respecting the land, made after the mortgage, to persons not parties to the foreclosure, or whether he holds by title paramount the estate as held by the mortgagor before the mortgage, see *Packer v. Rochester, etc., R. Co.*, (1858) 17 N. Y. 283.

Damages for breach.—It is the general rule that a grantee under a deed containing a covenant against incumbrances, who has not been disturbed in his possession and who has not paid the mortgage or other money lien on the land, is not entitled, in an action for the breach of the covenant, to recover more than nominal damages. *McGuckin v. Milbank*, (1897) 152 N. Y. 297, 46 N. E. 490, affirming 83 Hun 473, 31 N. Y. S. 1049. But while the covenantee is confined to nominal damages until he actually suffers loss, when he has so suffered he can receive complete indemnity only by recovering the amount of his loss. *King v. Union Trust Co.*, (1911) 148 App. Div. 110, 133 N. Y. S. 18, affirmed (1913) 208 N. Y. 566 mem.; *Diniiny v. Brown*, (1912) 148 App. Div. 671, 133 N. Y. S. 314. Thus, if he has extinguished an incumbrance, he is entitled to recover the cost of so doing, but not to exceed the value of the premises. *Utica, etc., R. Co. v. Gates*, (1896) 8 App. Div. 181, 40 N. Y. S. 316. See also *Andrews v. Appel*, (1880) 22 Hun 429; *Stanard v. Eldridge*, (1819) 16 Johns. 254; *Dimmick v. Lockwood*, (1833) 10 Wend. 142. And when the grantee comes to sell the property, if it appears that, in consequence of an incumbrance, he received a less price than he would have received if the incumbrance had not existed, he can recover as damages the difference between the price that he actually realized and what he would have realized if there had been no incumbrance upon the property. *Seventy-third St. Bldg. Co. v. Jencke*, (1897) 19 App. Div. 314, 46 N. Y. S. 2.

A covenantee against incumbrances, who was not bound to indemnify his grantees and to whose grantees the benefit of the covenant did not pass, is not entitled to recover in an action for damages against his grantor for breach of the covenant by reason of an outstanding mortgage, in respect to such portion of the land as the covenantee had conveyed for its full value, unaffected by such outstanding mortgage, prior to the foreclosure of a mortgage executed by himself on the premises; but he may recover substantial damages in respect to the portion of the land owned by him at the time of such foreclosure, and of the title to which he was thereby divested, by showing that the sum obtained therefor on the foreclosure sale was affected by the outstanding mortgage, to his loss. *McGuckin v. Milbank*, (1897) 152 N. Y. 297, 46 N. E. 490, affirming 83 Hun 473, 31 N. Y. S. 1049.

V. FURTHER ASSURANCE

Covenant as running with the land.—A covenant for further assurance is prospective and runs with the land. *Clarke v. Priest*, (1897) 21 App. Div. 174, 47 N. Y. S. 489.

Expense of complying with covenant.—The expense of complying with a covenant of further assurance must be borne by the covenantee. *Werner v. Wheeler*, (1911) 142 App. Div. 358, 127 N. Y. S. 158.

VI. WARRANTY OF TITLE

Breach: see notes, 10 Ann. Cas. 1079; Ann. Cas. 1912C 650; Ann. Cas. 1913B 847, 873; 48 L. R. A. (N. S.) 619; 51 L. R. A. (N. S.) 428.

Covenant as running with the land.—A covenant of warranty of title runs with the land, and the maker may be sued by a subsequent grantee who has been injured by the breach thereof. *Geiszler v. De Graaf*, (1901) 166 N. Y. 339, 59 N. E. 993, 82 A. S. R. 659, affirming 44 App. Div. 178, 60 N. Y. S. 651; *Hunt v. Hay*, (1913) 156 App. Div. 138, 140 N. Y. S. 1070; *Keyes, etc., Realty Co. v. Canton Christian College*, (1911) 146 App. Div. 796, 131 N. Y. S. 527, affirmed (1912) 205 N. Y. 593, 98 N. E. 1105. And see generally, notes, 14 Ann. Cas. 129; 15 Ann. Cas. 57, 1055; Ann. Cas. 1915B 875; 4 L. R. A. (N. S.) 466; 6 L. R. A. (N. S.) 436; 14 L. R. A. (N. S.) 185; 27 L. R. A. (N. S.) 229; L. R. A. 1917A 127.

Where action to enforce covenant must be brought.—As an action for breach of warranty is based upon the privity of estate rather than upon privity of contract, the action is local and must be brought in the courts of the state where the land is located; and hence the courts of this state have no jurisdiction of an action against a domestic corporation for breach of such a warranty brought by a remote grantee, where the lands are situated in a foreign state. *Keyes, etc., Realty Co. v. Canton Christian College*, (1911) 146 App. Div. 796, 131 N. Y. S. 527, affirmed (1912) 205 N. Y. 593, 98 N. E. 1105. But where a grantor of lands situated in another state made a covenant warranting title, and his grantee, who conveyed with similar warranty, was compelled to make good to his grantees for an eviction by one having paramount title, it was held that the assignee of his claim against the original grantor for breach of warranty could bring suit in the courts of this state. The action being by the assignee of the defendant's immediate grantee and being based on privity of contract, the case was distinguished from *Keyes, etc., Realty Co. v. Canton Christian College*, *supra*, where the action was by a remote grantee and based on privity of estate. *Morris v. Hay*, (1916) 172 App. Div. 145, 158 N. Y. S. 206.

Measure of damages for breach.—The measure of damages for breach of warranty of title, not including interest, is the value of the land at the time of the defendant's conveyance, which is conclusively presumed to be the actual consideration received by him. So that no matter how much a subsequent grantee may have paid for the property he is limited in his recovery in an action against a remote grantor to the consideration received by the latter. *Hunt v. Hay*, (1913) 156 App. Div. 138, 140 N. Y. S. 1070. See also *Jenks v. Quinn*, (1891) 61 Hun 427, 16 N. Y. S. 240, affirmed (1893) 137 N. Y. 223, 33 N. E. 376.

§ 254. **Construction of clauses and covenants in mortgages and bonds.** In mortgages of real property, and in bonds secured thereby or in assignments of mortgages and bonds, or in agreements to extend or to modify the terms of mortgages and bonds, the following or similar clauses and covenants must be construed as follows:

1. **Clauses of mortgage.** The words "This mortgage, made the ..(A).. day of ..(B).., nineteen hundred and ..(C).., between ..(D).., the mortgagor, and ..(E).., residing at ..(F).., the mortgagee, Witnesseth, that to secure the payment of an indebtedness in the sum of ..(G).. dollars, lawful money of the United States, to be paid on the ..(H).. day of ..(I).., nineteen hundred and ..(J).., with interest thereon to be computed from ..(K).. at the rate of ..(L).. per centum per annum, and to be paid ..(M).., according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee (description)," must be construed as equiv-

alent in meaning to the words "This indenture, made the ..(A¹).. day of ..(B¹).., in the year nineteen hundred and ..(C¹).., between ..(D).., party of the first part, and ..(E¹).., of ..(F¹).., party of the second part.

"Whereas, the said ..(L¹).. is justly indebted to the said party of the second part in the sum of ..(G¹).. dollars, lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of ..(G¹).. dollars, on the ..(H¹).. day of ..(I¹).. nineteen hundred and ..(J¹).. and the interest thereon, to be computed from ..(K¹).., at the rate of ..(L¹).. per centum per annum, and to be paid ..(M¹)..

"It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of any installment of principal, interest, taxes or assessments, as hereinafter provided.

"Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar, paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (or successors) and assigns forever (description), together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises, together with all fixtures and articles of personal property attached to, or used in connection with, the premises. To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever. Provided, always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine and be void."

(Explanation: Whatever words are inserted in the blank spaces above marked (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L) and (M) respectively, shall be construed as being inserted in the corresponding blank spaces above marked (A¹), (B¹), (C¹), (D¹), (E¹), (F¹), (G¹), (H¹), (I¹), (J¹), (K¹), (L¹) and (M¹) respectively.)

2. Covenant that whole sum shall become due. A covenant "that the whole of the said principal sum shall become due after default in the payment of any installment of principal or of interest for days, or after default in the payment of any tax, water rate or assessment for days after notice and demand," must be construed as meaning that should any de

fail to be made in the payment of any installment of principal or any part thereof, or in the payment of the said interest, or of any part thereof, on any day wherein the same is made payable, or should any tax, water rate or assessment, which now is or may be hereafter imposed upon the premises hereinafter described, become due or payable, and should the said interest remain unpaid and in arrear for the space of days, or such tax, water rate or assessment remain unpaid and in arrear for days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the afore-said principal sum, with all arrearage of interest thereon, shall, at the option of the said mortgagee or obligee, his executors, administrators, successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding.

3. *Covenant to pay indebtedness.* In default of payment, mortgagee to have power to sell. A covenant "that the mortgagor will pay the indebtedness, as hereinbefore provided," must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, doth covenant and agree to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon as provided by said mortgage. And if default shall be made in the payment of the principal sum or the interest that may grow due thereon, or of any part thereof, or in case of any other default, that then and from thenceforth it shall be lawful for the mortgagee, his executors, administrators or successors to enter into and upon all and singular the premises granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said mortgagor, his heirs, executors, administrators, successors or assigns therein, at public auction, according to the act in such case made and provided, and as the attorney of the mortgagor for that purpose duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance for the same in fee simple (or otherwise; as the case may be) and out of the money arising from such sale, to retain the principal and interest which shall then be due, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase-money, if any there shall be, unto the mortgagor, his heirs, executors, administrators, successors or assigns, which sale so to be made shall forever be a perpetual bar both in law and equity against the

mortgagor, his heirs, successors and assigns, and against all other persons claiming or to claim the premises, or any part thereof by, from or under him, them or any of them.

4. Mortgagor to keep buildings insured. A covenant "that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee," must be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by fire, to an amount and in a company to be approved by the mortgagee, and will assign and deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, so and in such manner and form that he and they shall at all time and times, until the full payment of said moneys, have and hold the said policy or policies as a collateral and further security for the payment of said money, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns, may make such insurance from year to year, in the sum not exceeding the principal sum for the purposes aforesaid, and pay the premium or premiums therefor, and that the mortgagor will pay to the mortgagee, his executors, administrators, successors or assigns, such premium or premiums so paid, with interest from the time of payment, on demand, and that the same shall be deemed to be secured by the mortgage, and shall be collectible thereupon and thereby in like manner as the principal moneys, and in default of such payment by the mortgagor, his heirs, executors, administrators, successors or assigns, or of assignment and delivery of policies as aforesaid the whole of the principal sum and interest secured by the mortgage shall, at the option of the mortgagee, his executors, administrators, successors or assigns, immediately become due and payable, and that should the holder of the mortgage by reason of such insurance against loss by fire receive any sum or sums of money for damage by fire, such amount may be retained and applied by the holder of the mortgage toward payment of the sum secured by the mortgage, or the same may be paid over either wholly or in part to the mortgagor or to the heirs (or successors) or assigns of the mortgagor for the repair of said buildings or for the erection of new buildings in their place, or for any other purpose or object satisfactory to the holder of the mortgage, and if the mortgagee receive and retain insurance money for damage by fire to said premises, the lien of the mortgage shall be affected only by a reduction of the amount of said lien by the amount of such insurance money received and retained by said mortgagee.

5. Mortgagor to warrant title. A covenant "that the mortgagor warrants the title to the premises," must be construed

as meaning that the mortgagor warrants that he has good title to said premises and has a right to mortgage the same and that the mortgagor shall and will make, execute, acknowledge and deliver in due form of law, all such further or other deeds or assurances as may at any time hereafter be reasonably desired or required for the more fully and effectually conveying the premises by the mortgage described, and thereby granted or intended so to be, unto the said mortgagee, his executors, administrators, successors or assigns, for the purpose aforesaid, and unto all and every person or persons, corporation or corporations, deriving any estate, right, title or interest therein, under the said indenture or mortgage, or the power of sale therein contained, and the said granted premises against the said mortgagor, and all persons claiming through him with warrant and defend.

6. Mortgagor to pay all taxes, assessments or water rates. A covenant "that the mortgagor will pay all taxes, assessments or water rates and in default thereof, the mortgagee may pay the same" must be construed as meaning that until the amount hereby secured is paid, the mortgagor will pay all taxes, assessments and water rates which may be assessed or become liens on said premises, and in default thereof the holder of this mortgage may pay the same, and the mortgagor will repay the same with interest, and the same shall be liens on said premises and secured by the mortgage.

7. Statement of amount due. A covenant "that the mortgagor within days upon request in person or within days upon request by mail will furnish a statement of the amount due on this mortgage" must be construed as meaning that the mortgagor, and any subsequent owner of the premises described herein upon request, made either personally or by mail, shall certify, by a writing duly acknowledged, to the mortgagee or to any proposed assignee of this mortgage, the amount or principal and interest then owing on this mortgage and whether any offsets or defenses exist against the mortgage debt; upon failure to furnish such certificate after the expiration of days in case the request is made personally, or after the expiration of days after the mailing of such request in case the request is made by mail, this mortgage shall become due at the option of the holder thereof.

8. Notice and demand. A covenant "that notice and demand or request may be made in writing and may be served in person or by mail" must be construed as meaning that every provision for notice and demand or request shall be deemed fulfilled by written notice and demand or request personally served on one or more of the persons who shall at the time hold the record title to the premises, or on their heirs or successors, or mailed by depositing it in any post-office station or letter-box, enclosed in a postpaid

envelope addressed to such person or persons, or their heirs or successors, at his, their or its address to the mortgagee last known.

9. Power of attorney to assignee. The word "assign" or other words of assignment, when contained in an assignment of a mortgage and bond, must be construed as having included in their meaning that the assignor does thereby make, constitute and appoint the assignee the true and lawful attorney, irrevocable, of the assignor, in the name of the assignor, or otherwise, but at the proper costs and charges of the assignee, to have, use and take all lawful ways and means for the recovery of the money and interest secured by the said mortgage and bond, and in case of payment to discharge the same as fully as the assignor might or could do if the assignment were not made.

Laws 1890, ch. 475, provided for a short form for conveyances and mortgages which might be used in the place of the verbose and cumbersome forms theretofore used. This act, in part, was the source from which section 219 of the Real Property Law of 1896 was derived. This section was amended by L. 1897, ch. 277, and as so amended was the source from which section 254 of the Real Property Law of 1909 was taken. The last named section was amended by L. 1917, ch. 682, so as to conform to and construe the short forms for mortgages which were provided for by the amendment to section 258 by L. 1917, ch. 681.

Section 254 of the Real Property Law of 1896 is now covered by section 365.

Power of sale in mortgage: see *supra*, § 146.

Construction of covenants in mortgages on leases of real property and bonds: see *infra*, § 271.

Penalty for using long forms of covenants: see *infra*, § 327.

Limitation of action for breach of covenant: see Code Civ. Pro., § 381.

I. Election to demand payment of principal sum

II. Insurance of buildings

I. ELECTION TO DEMAND PAYMENT OF PRINCIPAL SUM

Generally.—An action of foreclosure is equitable in its nature, and an election to demand payment of the principal sum will not be enforced if unconscionable in character. *Bieber v. Goldberg*, (1909) 133 App. Div. 207, 117 N. Y. S. 211. It is in the province of a court of equity to see to it that a party invoking its aid shall have dealt fairly before relief is given. *Germania Life Ins. Co. v. Potter*, (1908) 124 App. Div. 814, 109 N. Y. S. 435.

Failure to pay taxes.—Where on appeal from a judgment of foreclosure it appeared that the plaintiff took an unconscionable advantage by declaring the mortgage due because of the defendant's failure to pay taxes as covenanted, on the very day they became due, it was held that a court of equity would reverse the decree and grant a new trial, although the answer did not ask for affirmative relief from the default, but merely demanded a dismissal of the complaint. *Germania Life Ins. Co. v. Potter*, (1908) 124 App. Div. 814, 109 N. Y. S. 435. See also *Ver Planck v. Godfrey*, (1899) 42 App. Div. 16, 58 N. Y. S. 784.

II. INSURANCE OF BUILDINGS

Fire insurance policies generally: see **INSURANCE LAW**, § 121 and note.

Construction of insurance policy generally.—The general rule to be observed in the construction of an insurance policy is that, if possible, effect should be given to every word and expression contained therein, and if the policy is

susceptible of two readings, or is so ambiguously expressed that reasonable and intelligent men on reading it might honestly differ as to its meaning, that reading must be adopted which is most favorable to the insured. *Kratzenstein v. Western Assur. Co.*, (1889) 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799, reversing 53 N. Y. Super. Ct. 505; *Coykendall v. Blackmer*, (1914) 161 App. Div. 11, 146 N. Y. S. 631; *Lite v. Firemen's Ins. Co.*, (1907) 119 App. Div. 410, 104 N. Y. S. 434, affirmed without opinion (1908) 193 N. Y. 639, 86 N. E. 1127.

Right to designate insurance company.—Where a mortgagor covenants to keep buildings insured for the benefit of the mortgagee, the latter has a right to require the insurance to be procured in such company as it may direct; but where the mortgagee's attorney approves the policies offered and they are accepted and a loan is made, such right is waived and the mortgagee cannot thereafter procure additional insurance at the mortgagor's expense, in the absence of any sufficient cause. *Heal v. Richmond County Sav. Bank*, (1908) 127 App. Div. 428, 111 N. Y. S. 602, affirmed without opinion (1909) 196 N. Y. 549, 89 N. E. 1101.

What constitutes default by mortgagor.—Where a mortgage contains a covenant to insure and provides that upon default by the mortgagor the mortgagee may insure and the premiums paid shall be added to the mortgage debt, an action is not maintainable upon an allegation that the defendant mortgagor has failed to keep the buildings insured and to assign the policy. In the absence of any allegation that the plaintiff has procured insurance or that any demand was ever made upon the defendant for premiums paid by the plaintiff for such insurance, the complaint does not state a cause of action. In such a case subdivision 4 does not confer upon the mortgagee the right to elect that the whole mortgage debt shall be due and payable immediately. *Bumpus v. Willett*, (1907) 55 Misc. 94, 106 N. Y. S. 366. But where a mortgagor of real estate, after repeated demands, fails to have the buildings thereon insured and permits them to become vacant, making it impossible for the mortgagee to effect such insurance, he is, under the usual insurance clause of the mortgage giving him the option to declare the whole sum secured by the mortgage due and payable, authorized to bring an action to foreclose because of the mortgagor's breach of his covenant to insure. *Marlatt v. Holdridge*, (1916) 97 Misc. 456, 161 N. Y. S. 148.

Refusal to accept policy.—Where a mortgage provides that the mortgagor shall keep the buildings insured against loss by fire, for the benefit of the mortgagee, the only right of the mortgagee upon default by the mortgagor in effecting the insurance is to take out such insurance "from year to year," and where upon the purchase of certain mortgaged premises by the defendant, who procured insurance thereon and tendered the policy to the mortgagee, the latter, who before the purchase by the defendant had procured insurance on the property for three years, cannot refuse to accept the defendant's policy, demand that he repay the premium on the three-year policy, and upon his default in so doing refuse to accept the payments of principal and interest tendered as provided in the mortgage, and maintain an action to foreclose the same, electing to demand payment of the entire sum secured by the mortgage. *Bieber v. Goldberg*, (1909) 133 App. Div. 207, 117 N. Y. S. 211.

Failure of insurance agent to collect premiums from mortgagor.—Under the standard mortgagee clause, attached to policies of fire insurance, providing in substance that the mortgagor shall keep the buildings insured against loss by fire for the benefit of the mortgagee, and that in case the mortgagor shall neglect to pay a premium due on the policy the mortgagee shall, on demand, pay the same, an insurance agent who has paid to the insurer premiums on policies issued to a mortgagor, and has failed to collect the same from the mortgagor, cannot recover the amount thereof from the mortgagee, where the insurance policies were never canceled and he did not call upon the mortgagee to pay the premiums until several years after they became due. *Coykendall v. Blackmer*, (1914) 161 App. Div. 11, 146 N. Y. S. 631.

Effect of section 271.—Section 271, *infra*, relates to mortgages on leases only, and, although enacted later, does not supersede the provisions of subdivision 4 of this section. *Bieber v. Goldberg*, (1909) 133 App. Div. 207, 117 N. Y. S. 211.

§ 255. Construction of grant of appurtenances and of all the rights and estate of grantor. In any grant or mortgage of freehold interests in real estate, the words, "together with the appurtenances and all the estate and rights of the grantor in and to said premises," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower and right of dower, curtesy and right of curtesy, property, possession, claim and demand whatsoever, both in law and in equity, of the said grantor of, in and to the said granted premises and every part and parcel thereof, with the appurtenances.

This section was derived from Real Property Law of 1896, § 220.

Section 255 of the Real Property Law of 1896 is now covered by section 306.

Terms "estate" and "interest in real property": see supra, § 240, subd. 4.

Estate which passes by grant: see supra, § 245.

Appurtenances: see notes, Ann. Cas. 1912B 10; Ann. Cas. 1916A 254; 46 L. R. A. (N. S.) 206.

Award in condemnation proceedings.—Damages incident to a change of the grade of a street are caused when the physical change is made, and belong to the person who owns the property at that time. *Matter of Grade Crossing Com'rs*, (1913) 209 N. Y. 139, reversing 155 App. Div. 808.

§ 256. Construction of grant in executor's or trustee's deed of appurtenances, and of the estate of testator and grantor. In any deed by an executor of, or trustee under a will, the words "together with the appurtenances and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein which said grantor has or has power to convey or dispose of, whether individually or by virtue of said will or otherwise," must be construed as meaning, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, or which the said grantor has or has power to convey or dispose of, whether individually or by virtue of the said last will and testament or otherwise, of, in and to the said granted premises, and every part and parcel thereof, with the appurtenances.

This section was derived from Real Property Law of 1896, § 221.

Section 256 of the Real Property Law of 1896 is now covered by section 307.

Effect of conveyance of decedent's interest under contract: see Code Civ. Pro., § 2715.

§ 257. Covenants bind representatives of grantor and mortgagor and inure to the benefit of whom. All covenants contained in any grant or mortgage of real estate bind the heirs, executors, administrators, successors and assigns, of the grantor or mortgagor, and inure to the benefit of the heirs, executors, administrators, successors and assigns of the grantee or mortgagee in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided.

This section was derived from Real Property Law of 1896, § 222.

Section 257 of the Real Property Law of 1896 is now covered by section 308.

Covenants not implied: see *supra*, § 251.

Application to restrictive covenants.—This section does not apply to covenants of a restrictive nature, which are not exclusively for the benefit of the grantor but of other property owners in the immediate vicinity. *Equitable Life Assur. Soc. v. Brennan*, (1896) 148 N. Y. 661, 43 N. E. 173, reversing 74 Hun 576, 26 N. Y. S. 600. See also *Wilmurt v. McGrane*, (1897) 16 App. Div. 412, 45 N. Y. S. 32; *Longworth v. Deane*, (1897) 15 App. Div. 461, 44 N. Y. S. 433; *Turner v. Howard*, (1896) 10 App. Div. 555, 42 N. Y. S. 335; *Levy v. Schreyer*, (1897) 19 Misc. 227, 43 N. Y. S. 199.

When executor entitled to be party defendant.—In *Brooklyn Cooperage Co. v. A. Sherman Lumber Co.*, (1916) 175 App. Div. 246, 161 N. Y. S. 514, it was held that in an action on covenants of warranty of title and quiet enjoyment, a judgment against the defendant would be admissible as evidence of the facts thereby established against the executor of the defendant's remote grantor, and hence that he had the right, under section 452 of the Code of Civil Procedure, to be made a party to the action, as having a legal interest in the subject matter, though he might have no legal interest in the specific property involved. The order in this case, however, was reversed in 220 N. Y. 642, on the ground that the action was for trespass in which only a money judgment was involved, so that section 452 of the Code of Civil Procedure was unavailable to the executor.

§ 258. Short forms of deeds and mortgages. The use of the following forms of instruments for the conveyance and mortgage of real property is lawful, but this section does not prevent or invalidate the use of other forms:

SCHEDULE A.

DEED WITH FULL COVENANTS.

Statutory Form A.

(Individual)

This indenture, made the day of nineteen hundred and, between (insert residence) party of the first part, and (insert residence) party of the second part,

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever,

all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part and assigns forever. And said covenants as follows:

First. That said is seized of said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That said will forever warrant the title to said premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE B.

DEED WITH FULL COVENANTS.

Statutory Form AA. (Corporation)

This indenture, made the day of, nineteen hundred and, between, a corporation organized under the laws of, party of the first part, and (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, ... and assigns forever. And the party of the first part covenants as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same;

Second. That the party of the second part shall quietly enjoy the said premises;

Third. That the said premises are free from incumbrances;

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises;

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its duly authorized officer the day and year first above written.

SCHEDULE C.

BARGAIN AND SALE DEED.

Statutory Form B. Without Covenant against Grantor.
(Individual)

This indenture, made the day of, nineteen hundred and, between, (insert residence) party of the first part, and, (insert residence) party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the above granted premises unto the party of the second part, ... and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE D.

BARGAIN AND SALE DEED.

Statutory Form BB. Without Covenant against Grantor.
(Corporation)

This indenture, made the day of, nineteen hundred and, between, a corporation organized under the laws of, party of the first part, and (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, ... and assigns forever.

In witness whereof, the party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its duly authorized officer the day and year first above written.

SCHEDULE E.

BARGAIN AND SALE DEED.

Statutory Form C.

With Covenant against Grantor.

(Individual)

This indenture, made the day of, nineteen hundred and, between, (insert residence), party of the first part, and, (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, his heirs and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, his heirs and assigns forever. And the party of the first part covenants that he has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE F.

BARGAIN AND SALE DEED.

Statutory Form CC.

With Covenant against Grantor.

(Corporation)

This indenture, made the day of, nineteen hundred and, between, a corporation organized under the laws of, party of the first part, and, (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, ... and assigns forever. And the party of the first part covenants that it has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In witness whereof, the party of the first part has caused its

corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written.

SCHEDULE G.

QUITCLAIM DEED.

Statutory Form D.

(Individual)

This indenture, made the day of, nineteen hundred and, between, (insert residence), party of the first part, and, (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby remise, release, and quitclaim unto the party of the second part, ... and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, ... and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE II.

QUITCLAIM DEED.

Statutory Form DD.

(Corporation)

This indenture, made the day of, nineteen hundred and, between, a corporation organized under the laws of, party of the first part, and, (insert residence), party of the second part:

Witnesseth, that the party of the first part, in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby remise, release and quitclaim unto the party of the second part, his heirs and assigns forever, all (description), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the premises herein granted unto the party of the second part, his heirs and assigns forever.

In witness whereof, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written.

SCHEDULE I.

EXECUTOR'S DEED.

Statutory Form E.

This indenture, made the day of, nineteen hundred and, between as executor of the last will and testament of, late of, deceased, party of the first part, and....., (insert residence) party of the second part:

Witnesseth, that the party of the first part, by virtue of the power and authority to him given in and by the said last will and testament, and in consideration of dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, ... his heirs and assigns forever, all (description), together with the appurtenances, and also all the estate which the said testator had at the time of his decease in said premises, and also the estate therein, which the party of the first part has or has power to convey or dispose of, whether individually, or by virtue of said will or otherwise.

To have and to hold the premises herein granted unto the party of the second part, ... and assigns forever.

And the party of the first part covenants that he has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

In presence of:

SCHEDULE J.

REFEREE'S DEED IN FORECLOSURE.

Statutory Form F.

This deed, made the.....day of....., nineteen hundred and....., between....., referee duly appointed in the action hereinafter mentioned, grantor, and..... (insert residence), grantee:

Witnesseth, that the grantor, the referee appointed in an action between....., plaintiffs, and....., defendants, foreclosing a mortgage recorded on the.....day of....., in the office of the of the county of, in liber..... of mortgages, at page....., in pursuance of a judgment entered at a special term of the....., on the day of....., and in consideration of..... dollars paid by the grantee, being the highest sum bid at the sale under said judgment, does hereby grant and convey unto the grantee, all (description),

To have and to hold the premises herein granted unto the grantee, ... and assigns forever.

In witness whereof, the grantor has hereunto set his hand and seal.

In presence of:

SCHEDULE K.

REFEREE'S DEED IN PARTITION.

Statutory Form G.

This deed, made the day of, nineteen hundred and, between, referee duly appointed in the action hereinafter mentioned, grantor, and, (insert residence), grantee:

Witnesseth, that the grantor, the referee appointed in an action in partition between, plaintiffs, and, defendants in pursuance of a judgment entered at a special term of the, on the day of, and in consideration of dollars paid by the grantee, being the highest sum bid at the sale under said judgment, does hereby grant and convey unto the grantee all (description),

To have and to hold the premises herein granted unto the grantee, ... and assigns forever.

In witness whereof, the grantor has hereunto set his hand and seal.

In presence of:

SCHEDULE L.

ASSIGNMENT OF LEASE.

Statutory Form II.

Know that, assignor, in consideration of dollars, paid by assignee, hereby assigns unto the assignee, a certain lease made by, to, dated the day of, and recorded on the day of, in the office of the of the county of, in liber of conveyances, at page, covering premises, together with the premises therein described, and the buildings thereon, with the appurtenances,

To have and to hold the same unto the assignee, ... and assigns, from the day of, nineteen hundred and, for all the rest of years mentioned in the said lease, subject to the rents, covenants, conditions and provisos therein also mentioned.

And the assignor hereby covenants that the said assigned premises are free from incumbrances.

In witness whereof, the assignor has hereunto set his hand and seal this day of, nineteen hundred and

In presence of:

SCHEDULE M.

MORTGAGE.

Statutory Form M.

This mortgage, made the day of, nineteen hundred and, between, (insert residence) the mortgagor, and (insert residence), the mortgagee.

Witnesseth, that to secure the payment of an indebtedness in the sum of dollars, lawful money of the United States, to be paid on the day of, nineteen hundred and, with interest thereon to be computed from, at the rate of per centum per annum, and to be paid, according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee (description).

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of interest for days, or after default in the payment of any tax, water rate or assessment for days after notice and demand.

5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments or water rates, and in default thereof, the mortgagee may pay the same.

7. That the mortgagor within days upon request in person or within days upon request by mail will furnish a statement of the amount due on this mortgage.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the mortgagor warrants the title to the premises.

In witness whereof this mortgage has been duly executed by the mortgagor.

In presence of:

SCHEDULE N.

ASSIGNMENT OF MORTGAGE.

Statutory Form I.

Without Covenant.

Know that assignor, in consideration of dollars, paid by assignee, hereby assigns unto the assignee, a certain mortgage made by, given to secure

payment of the sum of dollars and interest, dated the day of, recorded on the day of, in the office of the of the county of, in liber of mortgages, at page, covering premises, together with the bond or obligation described in said mortgage, and the moneys due and to grow due thereon with the interest,

To have and to hold the same unto the assignee, and to the successors, legal representatives and assigns of the assignee forever.

In witness whereof, the assignor has hereunto set his hand and seal this day of, nineteen hundred and

In presence of:

SCHEDULE O.

ASSIGNMENT OF MORTGAGE.

Statutory Form J.

With Covenant.

Know that, assignor, in consideration of dollars, paid by, assignee, hereby assigns unto the assignee, a certain mortgage made by, given to secure payment of the sum of dollars and interest, dated the day of, recorded on the day of, in the office of the of the county of, in liber of mortgages, at page, covering premises, together with the bond or obligation described in said mortgage, and the moneys due and to grow due thereon with the interest,

To have and to hold the same unto the assignee, and to the successors, legal representatives and assigns of the assignee forever.

And the assignee covenants that there is now owing upon said mortgage, without offset or defense of any kind, the principal sum of dollars, with interest thereon at per centum per annum from the day of, nineteen hundred and

In witness whereof, the assignor has hereunto set his hand and seal this day of, nineteen hundred and

In presence of:

SCHEDULE P.

RELEASE OF PART OF MORTGAGED PREMISES.

Statutory Form K.

This indenture, made the day of, nineteen hundred and, between, party of the first part, and, party of the second part,

Whereas, ... by indenture of mortgage, bearing date the day of, nineteen hundred and, recorded in the office of the of the county of in liber

of mortgages, of section, page, on the day of, nineteen hundred and, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements of which the lands hereinafter described are part, unto,

And whereas, the party of the first part, at the request of the party of the second part, has agreed to give up and surrender the lands hereinafter described unto the party of the second part, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on said mortgage,

Now this indenture witnesseth, that the party of the first part, in pursuance of said agreement, and in consideration of dollars, lawful money of the United States, ... paid by the party of the second part, does grant, release and quitclaim unto the party of the second part, all that part of said mortgaged lands described as follows: (description),

Together with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the party of the first part, of, in and to the same, to the intent that the lands hereby conveyed may be discharged from said mortgage, and that the rest of the land in said mortgage specified may remain to the party of the first part as heretofore,

To have and to hold the lands and premises hereby released and conveyed to the party of the second part, ... and assigns, to and their own proper use, benefit and behoof forever, free, clear and discharged of and from all lien and claim under and by virtue of the indenture of mortgage aforesaid.

In witness whereof, the party of the first part has signed and sealed these presents the day and year first above written.

In presence of:

SCHEDULE Q.

SATISFACTION OF MORTGAGE.

Statutory Form L.

Know all men by these presents, that do hereby certify that a certain indenture of mortgage, bearing date the day of, nineteen hundred and, made and executed by to secure payment of the principal sum of dollars and interest, and duly recorded in the office of the of the county of in liber of mortgages, of section, page, on the day of, nineteen hundred and, is paid, and do hereby consent that the same be discharged of record.

Dated the day of, nineteen hundred and

In presence of:

An act to provide for short forms of deeds and mortgages, being L. 1890, ch. 475, was the source from which section 223 of the Real Property Law of 1896 was derived. The section was amended by L. 1897, ch. 277, § 2, and the

amended section was made section 258 of the consolidated Real Property Law of 1909. This section was amended by L. 1917, ch. 681, to read as given in the text.

Section 258 of the Real Property Law of 1896 is now covered by section 309.

Form of mortgage on lease of real property: see *infra*, § 273.

Penalty for using long form of covenants: see *infra*, § 327.

Residence of grantor and grantee.—The form of deed stated in this section provides that the residence of both the grantor and the grantee shall be inserted therein. *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541. The omission of the residence of the grantee in deeds made by a judgment debtor is sufficient to raise an implication of fraud. *Bushby v. Berkeley*, (1914) 85 Misc. 178, 148 N. Y. S. 121.

Necessity of seal.—Since the enactment of the Real Property Law of 1896 (L. 1896, ch. 547), a conveyance of real estate does not require a seal. *Leask v. Horton*, (1902) 39 Misc. 144, 79 N. Y. S. 148. See *supra*, § 243 note.

Form of mortgage in relation to section 249.—The provisions of section 249, *supra*, relate to the clauses set forth in the statutory short form of mortgage contained in this section, and to mortgages in substantially that form, but do not require that an instrument which by its clauses is both a bond and a mortgage shall contain a covenant for the payment of the indebtedness to justify a deficiency judgment. *Katz v. Katz*, (1913) 80 Misc. 170, 140 N. Y. S. 971.

Cited.—This section was cited in *Mahoney v. Simms*, (1914) 86 Misc. 484, 148 N. Y. S. 1069.

§ 259. When contract to lease or sell void. A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent.

This section was derived from Real Property Law of 1896, § 224.

Section 259 of the Real Property Law of 1896 is now covered by section 310.

- I. In general, 298**
- II. Construction, 299**
- III. Applicability, 300**
- IV. Contracts for leasing in general, 300**
- V. Contracts for sale or interest, 302**
 - 1. In general, 302**
 - 2. Rights and remedies, 302**
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- VI. Consideration, 305**
- VII. Subscription, 306**
 - 1. "Subscribed by the lessor or grantor," 306**
 - 2. "Or by his lawfully authorized agent," 306**

I. IN GENERAL

Agreements required to be in writing: see *supra*, § 242; **PERSONAL PROPERTY LAW**, § 31.

Effect of void contract generally.—A contract void under this section cannot be enforced directly or indirectly, and confers no right and creates no obligation as between the parties to it; and no claim can be founded upon it as

against third persons. *Dung v. Parker*, (1873) 52 N. Y. 494, reversing 3 Daly 89. Thus, no action will lie to recover the price of land sold, where no written contract has been entered into between the parties, subscribed by the vendor, and assented to or accepted by the vendee. *Reynolds v. Dunkirk, etc., R. Co.*, (1854) 17 Barb. 613.

Contract partly void.—It has been held that if one part of an entire contract is void under this section the whole is void. *Dow v. Way*, (1865) 64 Barb. 255. Likewise, a contract required by the statute of frauds to be in writing cannot be partly in writing and partly oral. Thus, a contract for the sale of land, where the writing fixed the price, but referred to "terms as specified," not in the memorandum, cannot be made good by parol evidence of the time agreed upon for payment. *Wright v. Weeks*, (1862) 25 N. Y. 153, affirming 3 Bosw. 372.

Conditional contract.—Where the performance of one part of an entire contract is made conditional upon the nonperformance of another part, which is void under the statute, there can be no recovery upon the former, as it has no distinct consideration to support it. *De Beerski v. Paige*, (1867) 36 N. Y. 537, affirming 47 Barb. 172. And whatever right a defendant might have to avoid an entire transaction, he cannot take advantage of the part favorable, even though in writing, and reject another part of the contract unfavorable because not in writing. *Wood v. Richfield Springs*, (1914) 163 App. Div. 103, 148 N. Y. S. 498. See also *Greenley v. Greenley*, (1906) 114 App. Div. 640, 100 N. Y. S. 114.

Acceptance of contract.—A binding contract, enforceable in equity, may be constituted by the proposal of one party and the acceptance of the other, and the acceptance may be by acts as well as by words. If the proposal is in writing by the party to be charged and contains all the terms of the proposed contract, so that a simple assent only is required of the other party, that assent or acceptance may be verbal, and the contract as against the party signing is good within the statute. *Pettibone v. Moore*, (1894) 75 Hun 461, 27 N. Y. S. 455. See also *Snyder v. Neefus*, (1868) 53 Barb. 63; *Gale v. Nixon*, (1826) 6 Cow. 445.

Necessity of pleading statute.—The defense of the statute of frauds, to be available, must be pleaded; and in an action upon an oral contract within the statute, where the complaint does not disclose the nature of the contract, whether oral or written, the defendant must plead the statute in order to avail himself of the objection. *Matthews v. Matthews*, (1897) 154 N. Y. 288, 48 N. E. 531, reversing 8 App. Div. 616, 40 N. Y. S. 1145; *Norton v. Ritter*, (1907) 121 App. Div. 497, 106 N. Y. S. 129; *Banta v. Banta*, (1903) 84 App. Div. 138, 82 N. Y. S. 113. See also *Williamsburgh City Fire Ins. Co. v. Lichtenstein*, (1916) 98 Misc. 342, 164 N. Y. S. 345, affirmed 176 App. Div. 910; *Champlin v. Parish*, (1845) 11 Paige 405. And where the invalidity of a contract void under the statute does not appear on the face of the complaint the question of such invalidity can only be raised by answer. *Lasher v. McDermott*, (1916) 173 App. Div. 79, 158 N. Y. S. 708, appeal dismissed (1916) 219 N. Y. 554 mem.

II. CONSTRUCTION

Purpose of section.—The purpose of the section was to prevent litigation over oral agreements, where the terms are always dependent upon the uncertain and varying memory of witnesses. This evil was to be remedied by the reduction of the terms of the contract to writing, so that the parties might not misunderstand the particulars of the contract which they were making; that no one might be induced to enter a court of justice to vex the peace of his opponent without clear and definite evidence of the terms of the contract which formed the ground of action, equally accessible to both parties and to the court; and that perjury might not be invited to sustain a claim which never had any real existence. *Hagedorn v. Lang*, (1898) 34 App. Div. 117, 54 N. Y. S. 602; *Loomis v. Loomis*, (1871) 60 Barb. 22.

Section as extension of statute of frauds.—The provisions of this section are but an extension of the statute of frauds, and do not prohibit the making of an agreement in any way that the parties may see fit, nor render it illegal if not made in some particular way. The section simply requires that certain agreements must be proved by a writing, and enacts a rule of evidence in certain cases without condemning as illegal any contract that was legal before. *Bayles v. Strong*, (1905) 104 App. Div. 153, 93 N. Y. S. 346, affirmed without opinion (1906) 185 N. Y. 582, 78 N. E. 1099.

III. APPLICABILITY

Contracts within statute: see notes, 6 Ann. Cas. 46; 7 Ann. Cas. 1142; 11 Ann. Cas. 313; 13 Ann. Cas. 140; 15 Ann. Cas. 1177; 16 Ann. Cas. 150; 20 Ann. Cas. 1137; Ann. Cas. 1912A 308; Ann. Cas. 1912B 320, 662; Ann. Cas. 1912C 470; Ann. Cas. 1913E 567; Ann. Cas. 1914A 434; Ann. Cas. 1914B 122; Ann. Cas. 1914C 926; Ann. Cas. 1915A 463; Ann. Cas. 1916D 970; 19 L. R. A. (N. S.) 879; 23 L. R. A. (N. S.) 1218; 24 L. R. A. (N. S.) 315; 27 L. R. A. (N. S.) 226; 28 L. R. A. (N. S.) 738; 30 L. R. A. (N. S.) 324; 33 L. R. A. (N. S.) 973; 46 L. R. A. (N. S.) 129; 47 L. R. A. (N. S.) 877; 49 L. R. A. (N. S.) 820; L. R. A. 1915A 521; L. R. A. 1915C 400.

Contract for sale of land in foreign state.—It has been held that the statute is not applicable to a contract made in this state for the sale of lands situated in another state. *Burrell v. Root*, (1869) 40 N. Y. 496.

As to conflict of laws concerning contracts for the sale of land under the statute of frauds, see 20 Ann. Cas. 468, note.

Agreement not likely to be performed within a year.—It has been held that the statute does not include an agreement which is not likely or is not expected to be performed within a year, if when fairly and reasonably interpreted it admits of a valid execution within the time, although it may not be probable that it will be. *Ward v. Hasbrouck*, (1902) 169 N. Y. 407, 62 N. E. 434, affirming 52 App. Div. 627, 65 N. Y. S. 200; *Warren Chemical, etc., Co. v. Holbrook*, (1890) 118 N. Y. 586, 23 N. E. 908, 16 A. S. R. 788; *Kent v. Kent*, (1875) 62 N. Y. 560, 20 Am. Rep. 502, reversing 1 Hun 529, 3 Thomp. & C. 630.

IV. CONTRACTS FOR LEASING IN GENERAL

When lease void: see *supra*, § 231.

Agreement to make lease.—A written memorandum signed by a proposed tenant agreeing to execute a lease of certain premises when presented to him, sent to the proposed landlord and indorsed "accepted" by him, is binding upon the tenant, and such agreement is not void under the statute of frauds, although no copy of the paper is returned to the tenant after acceptance by the landlord and he is not notified of the acceptance. *Corn v. Bergmann*, (1910) 138 App. Div. 260, 123 N. Y. S. 160. See also *Roskam-Scott Co. v. Thomas*, (1916) 175 App. Div. 84, 161 N. Y. S. 776. But an agreement for a new lease will not effect the surrender of an existing lease by operation of law, unless a new lease is made, valid in law to pass an interest according to the contract and intention of the parties. A verbal agreement, therefore, for a term longer than one year, will not operate as a surrender of an existing lease under seal. *Coe v. Hobby*, (1878) 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun 157.

Lease to commence at future day.—A parol lease of lands for the term of one year, to commence at a future day, is valid under the statute of frauds. *Ward v. Hasbrouck*, (1902) 169 N. Y. 407, 62 N. E. 434, affirming 52 App. Div. 627, 65 N. Y. S. 200; *Young v. Duke*, (1851) 5 N. Y. 463, 55 Am. Dec. 356. See also *supra*, § 242 note, III. *Leases*.

Parol lease for more than one year.—A parol lease for a longer term than one year is void under the statute. *Durand v. Curtis*, (1874) 57 N. Y. 7;

Nassoit v. Huber, (1911) 130 N. Y. S. 143; *Greimel v. O'Connor*, (1909) 119 N. Y. S. 660; *Karsch v. Kalabza*, (1911) 144 App. Div. 305, 128 N. Y. S. 1027; *Van Arsdale v. Buck*, (1903) 82 App. Div. 383, 81 N. Y. S. 1017; *Spota v. Hayes*, (1901) 36 Misc. 532, 73 N. Y. S. 959.

Possession under void lease.—The mere fact that a person goes into possession under a parol lease, void because for a longer time than one year, does not create a yearly tenancy. The lease is ineffectual to vest any term whatever in the lessee, and when he goes into possession under it, with the consent of the lessor, in the absence of any other agreement, he becomes a tenant at will merely, subject to liability to pay, at the rate of the stipulated rent for the use and occupation. *Talamo v. Spitzmiller*, (1890) 120 N. Y. 37, 23 N. E. 980, 17 A. S. R. 607, 8 L. R. A. 221. See also *Laughran v. Smith*, (1878) 75 N. Y. 205, affirming 11 Hun 311; *Reeder v. Sayre*, (1877) 70 N. Y. 180, 26 Am. Rep. 567, affirming 6 Hun 562; *Karsch v. Kalabza*, (1911) 144 App. Div. 305, 128 N. Y. S. 1027; *Van Arsdale v. Buck*, (1903) 82 App. Div. 383, 81 N. Y. S. 1017. So, where one is in possession without any conveyance or any contract which will satisfy the statute of frauds, and there is no evidence of any certain definite contract that can be enforced in a court of equity, such possession creates merely a tenancy at will. *Burrows v. Fischer*, (1911) 71 Misc. 168, 129 N. Y. S. 902.

Ratification of lease by conveyance.—Where agents, not authorized by writing, lease premises for a term of five years and consent to subsequent assignments of the lease, and the principal, with knowledge of the facts, subsequently conveys the premises during the term by a deed which specifically recognizes the existence of the lease, there is a ratification thereof which would make it a fraud upon the tenant in possession to permit the grantee of the premises, with notice actual and constructive, to evict the tenant or set up an adverse title, whether or not the lease is void because made for a term exceeding one year and executed by an agent or agents not thereunto authorized by writing. *Appelbaum v. Galewski*, (1901) 34 Misc. 281, 69 N. Y. S. 636.

Rights of lessor as equivalent to those of vendor.—The rights of a lessor of real property are the same as those of a vendor, as under the terms of the statute a contract for leasing of real property for more than one year is coupled with an agreement for the sale of real property or of any interest therein. *Rouse v. H. Halper, Inc.*, (1917) 99 Misc. 494, 164 N. Y. S. 593.

Parol modification of existing lease.—Where the unexpired term of an original lease was two years and seven months, an attempted parol agreement in modification of its terms was held to be in violation of the statute. *Seymour v. Hughes*, (1907) 55 Misc. 248, 105 N. Y. S. 249.

Lease of oil wells.—While the right to operate for oil under a lease, contract, or other right or license is declared to be personal property by virtue of section 39 of the General Construction Law, it has never been held that the perpetual exclusive right to operate lands other than those occupied could be created except as provided by this section. *De Hart v. Enright*, (1916) 93 Misc. 213, 157 N. Y. S. 46.

Agreement to work farm on shares.—An agreement to sow different kinds of grain upon a farm, and to yield a certain proportion of each crop to the landlord, is an agreement to work on shares and not a lease to render rent, and constitutes the parties tenants in common in the crops. *Caswell v. Districh*, (1836) 15 Wend. 379. One who enters upon the lands of another and puts in crops under a parol license and a parol agreement that he shall have the crops raised by him, is entitled to the crops, and, in case he is expelled from the land and the crops are converted by the owner or his agent, can maintain an action for such conversion. *Harris v. Frink*, (1872) 49 N. Y. 24, 10 Am. Rep. 318, reversing 2 Laus. 35.

Agreement for board and lodging.—An agreement for board and lodging, with a designation of the particular rooms which the defendant is to occupy, is not a contract for the hiring and letting of real estate. When one contracts with the keeper of a hotel or boarding place for rooms and board, whether for a week or for a year, the technical relation of landlord and tenant is not created between the parties, and the lodger acquires no interest in the real estate. *Wilson v. Martin*, (1845) 1 Denio 602.

V. CONTRACTS FOR SALE OR INTEREST

1. *In General*

Agreement to pay for lands conveyed.—A mere agreement to pay for lands conveyed is not within the statute and need not be in writing. *Thomas v. Dickinson*, (1855) 12 N. Y. 364, reversing 14 Barb. 90.

Foreclosure sales.—Sales in foreclosure actions are not within the statute of frauds, and are binding upon the purchasers without any written contract or memorandum of sale. Thus, a purchaser by bidding subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceeding and may be compelled by order of the court to complete his purchase. *Andrews v. O'Mahoney*, (1889) 112 N. Y. 567, 20 N. E. 374. See also *McCraith v. National Mohawk Val. Bank*, (1887) 104 N. Y. 414, 10 N. E. 862; *National Fire Ins. Co. v. Loomis*, (1847) 11 Paige 431. But it has been held that a parol agreement made by one who purchases lands at a foreclosure sale to hold them and convey to another person, at an advance over the purchase price, within a period specified, is unenforceable under the statute. *Riker v. Comfort*, (1910) 140 App. Div. 117, 124 N. Y. S. 1106. See also *Lathrop v. Hoyt*, (1849) 7 Barb. 59.

Agreement to pay assessment.—A promise made by a vendor, at the time of the delivery by him of a deed of real estate contracted to be sold, to the effect that if the vendee would accept and pay the purchase money he would pay an assessment upon the premises when due, was held to be valid and binding. It was further held that such agreement was not merged in the deed, and was not affected by the statute of frauds. *Remington v. Palmer*, (1875) 62 N. Y. 31, reversing 1 Hun 619, 4 Thomp. & C. 696.

Parol agreement to maintain or remove fence.—In an early case a parol agreement between a railroad company and the owner of adjoining land that the latter would, for an adequate consideration, erect and maintain a division fence between them, was held not within the statute of frauds. *Talmadge v. Rensselaer, etc., R. Co.*, (1852) 13 Barb. 493. And a parol agreement to remove a fence so as to restore a highway to its original width has been held not to be an agreement concerning the title to land or an interest therein. *Storms v. Snyder*, (1813) 10 Johns. 109.

Agreement for sale of growing trees.—An agreement for the sale of growing trees, with the right to enter on the land at a future time and remove them, is a contract for the sale of an interest in lands, and to be valid must be in writing. *Green v. Armstrong*, (1845) 1 Denio 550; *Bayles v. Strong*, (1905) 104 App. Div. 153, 93 N. Y. S. 346, affirmed without opinion (1906) 185 N. Y. 582, 78 N. E. 1099. See also *Warren v. Leland*, (1848) 2 Barb. 613; *Lansingburgh Bank v. Crary*, (1847) 1 Barb. 542. But an agreement for the sale of logs is not required to be in writing. *Boyce v. Washburn*, (1875) 4 Hun 792. See also *Thayer v. Rock*, (1834) 13 Wend. 53.

Sale of bark on growing trees.—The sale of bark on growing trees is a sale of an interest in lands, and a contract therefor requires a written instrument. *Thomson v. Poor*, (1890) 57 Hun 285, 10 N. Y. S. 597.

Oral representation as to restrictive covenant.—An oral representation by a grantor that adjoining lands owned by him are subject to a restriction limiting the buildings thereon to private residences, is void under the statute. *Norton v. Ritter*, (1907) 121 App. Div. 497, 106 N. Y. S. 129.

Oral agreement to remove buildings.—An oral agreement to remove buildings standing on land has been held to be void, the buildings being real estate. *Volk v. Olsen*, (1907) 54 Misc. 227, 104 N. Y. S. 415.

2. *Rights and Remedies*

Breach of oral agreement to convey as fraud.—The mere breach of an oral agreement to convey an interest in lands is not such a fraud as will authorize a court of equity to interfere, as that court will not permit the statute of frauds to be used as an instrument of fraud. *Wood v. Rabe*, (1884) 96 N. Y. 414, 48 Am. Rep. 640. See also *Baum v. Holstein*, (1916) 93 Misc. 268, 157 N. Y. S. 966; *Bauman v. Holzhausen*, (1882) 26 Hun 505. Though

a. **parol agreement for the sale of lands** has been, in part, executed by a conveyance from a third party, an action will not lie against the vendor to enforce the performance of the residue of his contract to free the premises of incumbrances. *Baldwin v. Palmer*, (1851) 10 N. Y. 232, 61 Am. Dec. 743. And the payment of a specific sum of money is not sufficient to entitle the party to a specific performance of the contract unless possession has been delivered and taken thereunder, for the reason that a recovery of the consideration or for damages may be had in an action at law. *Braun v. Ochs*, (1902) 77 App. Div. 20, 79 N. Y. S. 100. See also *Conlon v. Mission of Immaculate Virgin*, (1903) 87 App. Div. 165, 84 N. Y. S. 49.

Covenants contrary to law.—A private contract to purchase land will not be enforced by specific performance unless the title is marketable; and thus a title subject to restrictive covenants which imposes greater restrictions on the use of the land than those imposed by law, renders the title unmarketable, and the court will not in such a case inquire into the question whether the restrictions are beneficial or otherwise. *Dethloff v. Voit*, (1916) 172 App. Div. 201, 158 N. Y. S. 522.

Effect of part performance of parol agreement to convey.—When a parol agreement for the conveyance of real estate, void by the statute of frauds, has been proved and part performance has been shown by acts of the party seeking relief, which could have been done with no other design than that of performance, if an action at law is not an adequate remedy the agreement will be specifically enforced. *McKinley v. Hessen*, (1911) 202 N. Y. 24, 95 N. E. 32, reversing 135 App. Div. 832, 120 N. Y. S. 257. And where a plaintiff seeking specific performance of a parol agreement to convey lands, void under the statute of frauds, has proved part performance pointing to the existence of the agreement, the court will permit proof thereof despite the statute in order that it shall not be made a shield of fraud. *McKinley v. Hessen*, (1909) 135 App. Div. 832, 120 N. Y. S. 257, reversed on other grounds (1911) 202 N. Y. 25. See also *Canda v. Totten*, (1898) 157 N. Y. 281, 51 N. E. 989, reversing 87 Hun 72, 32 N. Y. S. 962. Nor can the statute be invoked by the party who refused to perform, as against one not in default, for the purpose of invalidating that part of the contract which has been executed, and the latter cannot be compelled to relinquish any benefit he has acquired from its partial performance. *Harris v. Frink*, (1872) 49 N. Y. 24, 10 Am. Rep. 318, reversing 2 Lans. 35. But to constitute a part performance of a parol agreement which will estop a party from insisting on the statute of frauds the acts of such party must be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution. And they must be a part performance of the precise agreement set up. *Rathbun v. Rathbun*, (1849) 6 Barb. 98. And the acts of part performance which will take a case out of the statute of frauds must be unequivocally referable to the agreement of which they are a part execution. *Todd v. Pratt*, (1912) 149 App. Div. 457, 133 N. Y. S. 749.

Purchaser in possession.—As a general rule, courts of equity are called upon to decree specific performance of a contract for the conveyance of real estate, void under the statute, only when the purchaser is in possession. *Gross v. Gorsch*, (1908) 124 App. Div. 834, 109 N. Y. S. 234. See also *Hollander v. Lustik*, (1913) 79 Misc. 103, 140 N. Y. S. 659. But where a parol contract for the sale of vacant land was silent as to possession, and the vendee had paid the entire consideration and fully performed on his part, and all that remained for the vendor was to give a deed, it was held, in the absence of any evidence to the contrary, that there was an implied agreement or license that the vendee could at once take possession and have the use of the land. *Miller v. Ball*, (1876) 64 N. Y. 286. And when the vendee has received the possession and paid a part of the price the contract is not so utterly void that he can recover back the money as though there had never been an agreement. If he can recover at all, so long as the vendor is not in the wrong, he must first restore the possession and demand repayment of the money. *Abbott v. Draper*, (1847) 4 Denio 51.

Effect of failure of title.—Where a vendor contracts to sell land and the title to a part of it fails, the vendee may claim a specific performance of the contract as to that part of the land to which the vendor can give him a title and for a compensation in damages as to the part of the land to which the title fails. *Morss v. Elmendorf*, (1844) 11 Paige 277.

Effect of improvements.—In order to render improvements made by a purchaser, under an oral contract of sale, acts of partial performance which will estop the vendor from setting up the statute as a bar to the enforcement of the contract, they must be substantial and permanent in character, such as would not have been made except in reliance upon the contract, and the loss thereof a sacrifice to the purchaser. *Cooley v. Lobdell*, (1897) 153 N. Y. 596, 47 N. E. 783, affirming 82 Hun 98, 31 N. Y. S. 202. See also *Schirmer v. Rehill*, (1908) 57 Misc. 439, 109 N. Y. S. 745; *Conlon v. Mission of Immaculate Virgin*, (1903) 87 App. Div. 165, 84 N. Y. S. 49; *Veeder v. Horstmann*, (1903) 85 App. Div. 154, 83 N. Y. S. 99; *Dunkel v. Dunkel*, (1890) 56 Hun 25, 8 N. Y. S. 888; *Parkhurst v. Van Cortland*, (1816) 14 Johns. 15, 7 Am. Dec. 427. But it has been held that a parol contract to sell the mere improvements made on land was not within the statute as to the subject-matter. *Lower v. Winters*, (1827) 7 Cow. 263.

Decree of specific performance as binding all parties.—Where the specific execution of an agreement respecting real property is decreed between the parties, it will be decreed between all the parties claiming under them in privity of estate, unless other controlling equities intervene. *Veeder v. Horstmann*, (1903) 85 App. Div. 154, 83 N. Y. S. 99.

Agreement to repurchase lands.—Where, in order to induce a sale of lands, the grantor at the time of the delivery of the deed executed and delivered to the grantee a memorandum in writing stating that the grantor at the grantee's election would repurchase the property for the same consideration at any time one year after the conveyance, with six per cent interest per annum, the two instruments must be read together as part of one transaction, and the grantor, sued for the specified performance of the contract to repurchase, cannot defend upon the ground that the memorandum was not signed by the party who was to reconvey, as would otherwise be required by the section. *Van Name v. Queens Land, etc., Co.*, (1909) 130 App. Div. 857, 115 N. Y. S. 905.

Contract of sale by life tenant as binding remaindermen.—A written contract to sell lands executed by a life tenant but not by the remaindermen is not binding upon the latter, even though executed with their approval, and the vendee is not entitled to set aside a conveyance made to another party. Mere proof of the willingness of the remaindermen to sell their interest in connection with that of the life tenant does not establish a contract binding upon them. *Brustmann v. Motrie*, (1907) 118 App. Div. 395, 103 N. Y. S. 541.

Measure of damages.—The measure of damages for a breach by the vendee of his contract to purchase, is the difference between the contract price and the market value of the property at the time of the breach, less any portion of the purchase price which has been paid. It does not include taxes, brokers' commissions, and interest paid or accrued after the breach. *Hayden v. Pinchot*, (1916) 172 App. Div. 102, 158 N. Y. S. 215.

3. Evidence

Identification of subject-matter.—The rule in cases where a memorandum relating to the sale of real estate is attacked under the statute of frauds for insufficiency in respect to the identification of the subject-matter, is that while parol evidence cannot be admitted as to the terms of the agreement it nevertheless is receivable to show extrinsic circumstances relating to the situation of the parties in respect to the land, so as to enable the court definitely to ascertain the property to which the contract refers. *Daniels v. Rogers*, (1905) 108 App. Div. 338, 96 N. Y. S. 642; *Miller v. Tuck*, (1904) 95 App. Div. 134, 88 N. Y. S. 495. See also *Raubitschek v. Blank*, (1880) 80 N. Y. 478, affirming 44 Super. Ct. 564; *Levin v. Dietz*, (1905) 106 App. Div. 208, 94 N. Y. S. 419, 48 Misc. 593, 96 N. Y. S. 468. Thus, where it was insisted that a contract was made out by the letters of the parties, it was held that in the determination of the question the court should consider the entire correspondence, and not rest at the reading of only a part thereof. *Gates v. Dudgeon*, (1902) 72 App. Div. 562, 76 N. Y. S. 561. The decision in this case, however, was reversed in 173 N. Y. 426, when it was held that a letter written after the negotiations had resulted in a complete contract was inadmissible. And although the memorandum must contain what is necessary

to show what the contract between the parties is, the property mentioned in it may be ascertained and located by extrinsic evidence, especially where the memorandum refers to such extrinsic evidence. *Tallman v. Franklin*, (1856) 14 N. Y. 584, reversing 3 Duer 395. But a writing which does not express the consideration and is so indefinite in its description of the land that the intention of the parties cannot be gathered from it, does not express a contract for the conveyance of land or constitute a memorandum of such contract, within the requirements of the statute. *Cooley v. Lobdell*, (1897) 153 N. Y. 596, 47 N. E. 783, affirming 82 Hun 98, 31 N. Y. S. 202. See also *Coe v. Tough*, (1889) 116 N. Y. 273, 22 N. E. 550; *Ruggerio v. Leuchtenburg*, (1908) 61 Misc. 298, 113 N. Y. S. 615; *Bochly v. Mansing*, (1906) 52 Misc. 382, 102 N. Y. S. 171; *Braun v. Ochs*, (1902) 77 App. Div. 20, 79 N. Y. S. 100. Thus, where upon a sale of real estate at public auction the only note or memorandum of sale was an entry in a book of sales made and signed by the auctioneers, which does not name or describe the vendor, such memorandum is insufficient and the sale void. *Mentz v. Newwitter*, (1890) 122 N. Y. 491, 25 N. E. 1044, 19 A. S. R. 514, 11 L. R. A. 97. The whole contract, that is, the agreement to sell and the description of the lands or the interest in lands agreed to be sold, must be in writing and subscribed by the party. *Odell v. Montrose*, (1877) 68 N. Y. 499, reversing 6 Hun 155. But where the auctioneer pins a letter from the owner of lots to be sold, which states the terms of sale, on a page of his sales book, and makes the residue of the entries requisite to constitute a memorandum of the contract of the sale on the same page of the book, and subscribes his name to it, the latter is to be taken as a part of the memorandum subscribed by the auctioneer and renders it sufficient within the statute. *Tallman v. Franklin*, (1856) 14 N. Y. 584, reversing 3 Duer 395. And the signature of the vendor to the terms of sale, even prior to the actual sale, has been held to be a sufficient compliance with the statute. *Eagedorn v. Lang*, (1898) 34 App. Div. 117, 54 N. Y. S. 602.

Summing up the general rule, the court, in *De Goode v. Benton*, (1910) 141 App. Div. 22, 125 N. Y. S. 662, said: "The rule is well established that a note or memorandum sufficient to take a contract of sale out of the operation of the statute of frauds must state the whole contract with reasonable certainty so that the substance thereof may be made to appear from the record itself without recourse to parol evidence. Such essentials must appear without the aid of parol proof, either from the memorandum itself or from a reference therein to some other writing or thing, and such essentials, to make a complete agreement, must consist of the subject-matter of the sale, the terms and names, or a description of the parties."

VI. CONSIDERATION

Payment of consideration.—The payment of the consideration for an oral contract to convey lands, standing alone, does not take the contract out of the statute. In addition to payment the partial performance must be such that the party cannot be put in the same position as before and the equitable rule contemplates some action on the part of the party himself from which he cannot recede without injury to himself and which cannot be compensated in damages. *Cagger v. Lansing*, (1871) 43 N. Y. 550, reversing 57 Barb. 421; *Milholland v. Payne*, (1915) 169 App. Div. 712, 155 N. Y. S. 773. Payment of the consideration, even in full, is not of itself such a part performance as will justify a court of equity in enforcing a verbal contract for the sale of land. *Cooley v. Lobdell* (1897) 153 N. Y. 596, 47 N. E. 783, affirming 82 Hun 98, 31 N. Y. S. 202. Nor can a vendee recover a payment made to apply on the purchase price of lands under a parol contract which is void within the statute of frauds unless the vendor has repudiated the contract or is unable or unwilling to perform. *Graham v. Healy*, (1912) 154 App. Div. 76, 138 N. Y. S. 611. See also *Tuthill v. Roberts*, (1880) 22 Hun 304; *Collier v. Coates*, (1854) 17 Barb. 471.

Seal as evidence of consideration.—It has been held that a seal is *prima facie* evidence of a sufficient consideration for a contract. *Burrell v. Root*, (1869) 40 N. Y. 496. But in this connection it should be remembered that a seal is no longer required. *Heburn v. Reynolds*, (1911) 73 Misc. 73, 132 N. Y. S. 460.

Parol contract for personal services to be paid for in real estate.—A parol contract for personal services to be performed in the future and to be paid for in real and personal estate at the death of the employer, is within the statute, and therefore void. *Lisk v. Sherman*, (1857) 25 Barb. 433. See also *King v. Brown*, (1842) 2 Hill 485.

VII. SUBSCRIPTION

1. "*Subscribed by the Lessor or Grantor*"

Meaning of "subscribed."—The word "subscribed" means signing at the bottom or end of the contract. *James v. Patten*, (1851) 6 N. Y. 9, 55 Am. Dec. 376, reversing 8 Barb. 344; *Viele v. Osgood*, (1849) 8 Barb. 130; *Davis v. Shields*, (1841) 26 Wend. 341; *Worthington Brick Co. v. Bull*, (1887) 44 Hun 462, 9 N. Y. St. Rep. 195; *Coles v. Bowne*, (1844) 10 Paige 526.

Sufficiency of signing as to parties.—In a contract for the purchase and sale of lands the statute is satisfied if the party to be charged therewith signs the contract. It is not necessary to the validity of the contract that it be signed by both parties. *McCrea v. Purmort*, (1836) 16 Wend. 460, 30 Am. Dec. 103; *Worrall v. Munn*, (1851) 5 N. Y. 229, 55 Am. Dec. 330; *Quinto v. Alexander*, (1907) 123 App. Div. 1, 107 N. Y. S. 422; *Levin v. Dietz*, (1905) 106 App. Div. 208, 94 N. Y. S. 419, 48 Misc. 593, 96 N. Y. S. 468; *Edwards v. Farmers' Fire Ins., etc., Co.*, (1839) 21 Wend. 467, affirmed 26 Wend. 541. But it is not sufficient that there be a subscription by the vendee only, as he is not required to sign. *Haydock v. Stow*, (1869) 40 N. Y. 363; *Pelletreau v. Brennan*, (1906) 113 App. Div. 803, 99 N. Y. S. 955; *Reilly v. Steinhardt*, (1908) 58 Misc. 471, 111 N. Y. S. 472, affirmed 126 App. Div. 909, 110 N. Y. S. 1142; *Kittel v. Stueve*, (1895) 10 Misc. 696, 31 N. Y. S. 821, affirmed without opinion (1895) 146 N. Y. 380, 41 N. E. 89.

Methods of subscription.—A contract for the sale of real property may be subscribed in typewriting as well as with pen and ink; and an actual signing of the name by the hand at the end of the agreement may be by making a mark, even though the person can write, or by the use of a rubber stamp, or by the use of a printed name, when it is the intention to adopt such printed name as the signature. *Landecker v. Co-operative Bldg. Bank*, (1911) 71 Misc. 517, 130 N. Y. S. 780.

Time of subscription.—The statute does not require that the memorandum be subscribed at the time of making the agreement. It may be subscribed at any time thereafter, before the time for its consummation. *Webster v. Zielly*, (1868) 52 Barb. 482.

2. "*Or by His Lawfully Authorized Agent*"

Authority of agent in general.—The statute does not require the agent's authority to be in writing. The way of conferring authority on the agent not being prescribed by it, is left to the general law of agency, which prescribes that an agent cannot bind his principal by executing in the name of such principal an instrument required by law to be under seal in order to be valid, unless authorized thereunto by seal. But if an agent not authorized by seal executes an instrument under seal in the name of his principal, which is not required by law to be sealed, evidence of his authority, oral or written, to make a simple contract for his principal is competent, and the seal, being superfluous, will be disregarded and the instrument held good as a simple contract. *Stanton v. Granger*, (1908) 125 App. Div. 174, 109 N. Y. S. 134, affirmed without opinion (1908) 193 N. Y. 656, 87 N. E. 1127. See also *Pringle v. Spaulding*, (1868) 53 Barb. 17; *McWhorter v. McMahan*, (1843) 10 Paige 386. A subscription by the agent of the party to be charged has been held sufficient under the statute, although the name or existence of the principal does not appear in the instrument. *Dykers v. Townsend*, (1861) 24 N. Y. 57. But compare *Townsend v. Hubbard*, (1842) 4 Hill 351. But a person having authority merely to make a bargain for the sale of land is not an agent for the sale of the property, within the meaning of the provision allowing the name of the vendor to be subscribed "by his lawfully authorized agent." The agent must be authorized to sign the vendor's name

to the contract. *Coleman v. Garrigues*, (1854) 18 Barb. 60. See also *Lawrence v. Taylor*, (1843) 5 Hill 107.

Power of agent under parol authority.—It has been held that an agent acting under parol authority may bind his principal by a contract for the sale of lands executed by him in the name of his principal. *Moody v. Smith*, (1877) 70 N. Y. 598. See also *Briggs v. Partridge*, (1876) 64 N. Y. 357, 21 Am. Rep. 617, affirming 39 Super. Ct. 339; *Dung v. Parker*, (1873) 52 N. Y. 494, reversing 3 Daly 89; *Pringle v. Spaulding*, (1868) 53 Barb. 17. But in *Griffin v. Baust*, (1898) 28 App. Div. 553, 50 N. Y. S. 905, it was held that an agent not authorized by writing had no authority to execute a lease for a term longer than one year.

Parol ratification of agent's authority.—Although the statute requires a contract for the sale of land to be in writing, subscribed by the party or his agent lawfully authorized, it is not necessary that the agent should have written authority. And where a person, without authority, executes a contract for the sale of lands in the name of the owner, a ratification by the latter, although by parol, makes the contract valid within the statute. *Newton v. Bronson*, (1856) 13 N. Y. 587, 67 Am. Dec. 89.

§ 260. Effect of grant or mortgage of real property adversely possessed. A grant of real property is absolutely void, if at the time of the delivery thereof, such property is in actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively. The provisions of this section do not apply to a grant of such property made to the people of the state of New York, nor to a person where the title granted to such person shall thereafter, by grant or mesne conveyance, become vested in said people.

This section was derived from Real Property Law of 1896, § 225. It was amended by L. 1909, ch. 481, by inserting the words "unless the same shall be made to the people of the state of New York" after the words "absolutely void" near the beginning of the first sentence. It was further amended by L. 1910, ch. 628, which struck out the words added by L. 1909, ch. 481, and added the last sentence of the section.

Section 260 of the Real Property Law of 1896 is now covered by section 311.

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I. CONSTRUCTION GENERALLY

Recording of letters patent: see *infra*, § 295.

Order and time of recording: see *infra*, §§ 317, 319.

Registered property not affected by prescription or adverse possession: see *infra*, § 401.

Buying lands in suit of person not in possession: see PENAL LAW, § 2031.

Buying pretended titles to real property: see PENAL LAW, § 2032.

Mortgage of lands under adverse possession: see PENAL LAW, § 2033.

Returning to take possession of lands after being removed by legal process: see PENAL LAW, § 2035.

Unlawful intrusion on real property: see PENAL LAW, § 2036.

Unauthorized applications for loans upon real property: see PENAL LAW, § 2039.

Adverse possession under written instrument and what constitutes it: see Code Civ. Pro., §§ 369, 370.

Purpose of section.—The purpose of the section is to protect the claimant, but he may renounce its benefit. *Keneda v. Gardner*, (1842) 4 Hill 469.

Section as declaratory of common-law rule.—The principles laid down by the section are simply declaratory of the common-law rule. *Hopkins v. Baker*, (1910) 140 App. Div. 460, 125 N. Y. S. 417; *Truax v. Thorn*, (1848) 2 Barb. 156. The common law declared void, as to the party in possession, a conveyance made when the land was held adversely to the parties to it, and also most contracts in relation thereto. *Vrooman v. Shepherd*, (1852) 14 Barb. 441.

Construction of section.—The language of the section is very significant and must be strictly construed by reason of its severity. Under it the possession for a single day by a person claiming under a title adverse to that of the grantor, whether such possession be known or unknown, avoids a conveyance. *Crary v. Goodman*, (1860) 22 N. Y. 170; *Cornwell v. Clement*, (1895) 87 Hun 50, 33 N. Y. S. 866; *Bissing v. Smith*, (1895) 85 Hun 564, 33 N. Y. S. 123. See also *Howard v. Howard*, (1854) 17 Barb. 663; *Smith v. Faulkner*, (1888) 48 Hun 186, 15 N. Y. St. Rep. 637.

Section in relation to statute of limitations.—The wording of this section must not be confused with the statute (Code Civil Procedure, § 370) which prescribes what shall constitute an adverse possession to set the statute of limitations running. The possession which is sufficient under that statute is possession under a claim of title. When that claim is set up it is not necessary that the pleader should show that he is under any specific title, but it is sufficient if he proves that he claims to hold the premises adversely to the right that he is contesting. The material matter where the statute of limitations is in question is the possession, and whether that possession has been taken under a claim of right hostile to the adverse party, without regard to what the particular claim is. The important matter, however, under this section, is the title and not the particular possession. *Finn v. Lally*, (1896) 1 App. Div. 411, 37 N. Y. S. 437. See also *Eisemann v. Lapp*, (1902) 38 Misc. 14, 76 N. Y. S. 695; *Fish v. Fish*, (1863) 39 Barb. 513. But statutes of limitation do not give validity to bad or imperfect titles as against a possessor who is not given notice to defend against them until after the limitation has expired. "They are shields for the defense of the possessor, not weapons for his eviction." *Marsh v. Ne-ha-sa-ne Park Assn.*, (1898) 25 App. Div. 34, 49 N. Y. S. 384, reversing 18 Misc. 314, 42 N. Y. 996.

II. APPLICABILITY GENERALLY

Application to state.—This section does not apply to possession of lands by the state. *Saranac Land, etc., Co. v. Roberts*, (1909) 195 N. Y. 303, 88 N. E. 753, affirming 125 App. Div. 333, 109 N. Y. S. 547. See also *Candee v. Hayward*, (1868) 37 N. Y. 653, affirming 34 Barb. 349. But it has been held that while perhaps the strict doctrine of adverse possession is not to be applied as against the sovereign state, yet where it is sought to establish title against the state, proof must be made of an adverse, hostile, notorious and continuous possession in the claimant for a period of forty years, as otherwise the presumption obtains that the state has received rents or profits or has been in possession within the forty year period. *Hamlin v. People*, (1913) 155 App. Div. 680, 140 N. Y. S. 643.

Application to equity of redemption.—This section has no application to the transfer of an equity of redemption. *Stoddard v. Whiting*, (1871) 46 N. Y. 627.

Application to assignments of mortgages.—This section does not assume to deal with assignments of mortgages. *De Garmo v. Phelps*, (1903) 176 N. Y. 455, 68 N. E. 873, reversing 64 App. Div. 590, 72 N. Y. S. 773.

Application to judicial sales.—Judicial sales are not within the condemnation of this section, and therefore a purchaser of land sold under a decree in a foreclosure action acquires a perfect title although at the time the premises are in the actual possession of one claiming title under a tax deed. *De Garmo v. Phelps*, (1903) 176 N. Y. 455, 68 N. E. 873, reversing 64 App. Div. 590, 72 N. Y. S. 773. See also *Towle v. Remsen*, (1877) 70 N. Y. 303; *Truax v. Thorn*, (1848) 2 Barb. 156. Nor do the provisions of the section apply to a deed from an assignee in bankruptcy, made in pursuance of an order of the bankruptcy court. In *re Downing*, (1912) 192 Fed. 683; *Coleman v. Manhattan Beach Imp. Co.*, (1883) 94 N. Y. 229, affirming 26 Hun 525 mem.; *Smith v. Scholtz*, (1877) 68 N. Y. 41; *Stevens v. Hauser*, (1868) 39 N. Y. 302, reversing 1 Robt. 50. On a partition sale the purchaser has title and a possession adverse to all parties, and hence subsequent deeds obtained from persons who were parties to the partition action, after the purchaser has been in actual possession under a recorded deed for many years, are void under the section. *McAuliff v. Hughes*, (1908) 128 App. Div. 355, 112 N. Y. S. 486.

III. GRANTS OF REAL PROPERTY

1. *In General*

Effect of deed as between grantor and grantee.—As between grantor and grantee, and persons standing in legal privity with them, the deed is operative and passes the title. *Livingston v. Proseus*, (1842) 2 Hill 526. See also *Pearce v. Moore*, (1889) 114 N. Y. 256, 21 N. E. 419; *Fryer v. Rockefeller*, (1875) 63 N. Y. 268, affirming 4 Hun 800; *Hamilton v. Wright*, (1868) 37 N. Y. 502; *Sheridan v. Caldwell*, (1911) 145 App. Div. 609, 130 N. Y. S. 638; *Johnson v. Snell*, (1890) 58 Hun 606 mem., 11 N. Y. S. 868; *Hennig v. Smith*, (1915) 151 N. Y. S. 444; *Pepper v. Haight*, (1854) 20 Barb. 429. It is void only as against parties holding and claiming title adversely; and in such a case an action to recover possession may be maintained by the grantee in the name of the grantor. *Ward v. Reynolds*, (1881) 25 Hun 385.

Conveyance by executor under power of sale.—In *Bullard v. Bicknell*, (1898) 26 App. Div. 319, 49 N. Y. S. 666, it was intimated that the section did not apply to a conveyance made by an executor under a power of sale, although the question was not specifically presented in that case.

Conveyance where land is occupied under tax lease.—Where one who enters under a tax lease subsequently grants the land in fee to another, who enters and holds under that grant, claiming title, such possession is adverse to that of the owner of the reversion, and a conveyance by the latter while the land is so held is void. *Sands v. Hughes*, (1873) 53 N. Y. 287. See also *Cardwell v. Clark*, (1916) 94 Misc. 433, 158 N. Y. S. 300; *Hoyt v. Dillon*, (1855) 19 Barb. 644.

Foreclosure before possession by mortgagor.—The language of this section seems to leave no doubt that where a mortgage on real property is executed by one out of possession no action thereon can be maintained. The mortgagee must either sue upon the bond, or, if he desires to enforce his rights on the real estate, wait until the mortgagor or his representative has actually recovered possession thereof. *Hopkins v. Baker*, (1910) 140 App. Div. 460, 125 N. Y. S. 417. See also *Timmerman v. Cohn*, (1911) 70 Misc. 327, 128 N. Y. S. 770, affirmed 146 App. Div. 924, reversed on other grounds (1912) 204 N. Y. 614 mem.

Effect of *lis pendens* filed under void deed.—A *lis pendens* filed by a successor of the grantee in a deed void under this section is not a cloud upon the recorded title which warrants a purchaser at a judicial sale in rejecting the title and refusing to complete his purchase. *Baecht v. Hevesy*, (1906) 115 App. Div. 509, 101 N. Y. S. 413.

Seizin of wild or vacant lands.—It has been held that a conveyance of wild or vacant lands gives a constructive seizin thereof in the grantee and

attaches to him all the legal remedies incident to the estate. *Poor v. Horton*, (1853) 15 Barb. 485.

Knowledge imputed to purchaser.—Where a purchaser of land has knowledge of any facts sufficient to put him on inquiry as to the existence of some right or some title in conflict with that which he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser. *Sweet v. Henry*, (1903) 175 N. Y. 268, 67 N. E. 574, reversing 66 App. Div. 383, 72 N. Y. S. 868.

Necessity of pleading statute as a defense.—Where a defendant claims that a deed is void under the statute, it is a matter of defense which must be set up in the answer. *Ten Eyck v. Witbeck*, (1900) 55 App. Div. 165, 66 N. Y. S. 921, affirmed (1902) 170 N. Y. 564, 62 N. E. 1101. But the defense of the section is unavailable to one who makes no claim of title and is simply in possession of the property not claiming to be rightfully in possession. It is not sufficient even that he claims title, but he must disclose some specific alleged title that the court may see that it is adverse to that of the grantor. *Belcher v. Belcher*, (1909) 134 App. Div. 726, 119 N. Y. S. 144. See also *McAuliff v. Hughes*, (1909) 134 App. Div. 734, 119 N. Y. S. 507; *Finn v. Lally*, (1896) 1 App. Div. 411, 37 N. Y. S. 437.

Burden of proof.—As a general rule a grantee entering under color of title is not required to make inquiry into the nature of his grantor's title, nor is he chargeable with constructive notice of its defects. But the burden of proof is upon the grantee to prove that he entered into and was in actual possession of the premises under a deed to him and holding adversely to the title of the plaintiff's grantor at the time the deed was made to the plaintiff. *Bissing v. Smith*, (1895) 85 Hun 564, 33 N. Y. S. 123. And when the title is proved to be in a person out of possession, and the defendant claims to hold by adverse possession, he must establish his claim by positive affirmative proof, and not leave it to inference. *Howard v. Howard*, (1854) 17 Barb. 663. So, the question of possession by one other than the owner of the legal title involves a conclusion of law which cannot be stated by a witness, but is to be drawn from the facts. *Arents v. Long Island R. Co.*, (1898) 156 N. Y. 1, 50 N. E. 422, affirming 89 Hun 126, 34 N. Y. S. 1085. A statement, by parties who ask judgment under section 1279 of the Code of Civil Procedure, that a person was in undisturbed possession of land for twenty years and upwards under a deed, is not sufficient to establish title by adverse possession, as it does not necessarily follow therefrom that the entry and possession were exclusive of any other right, and this is essential to constitute an adverse holding which will divest the owner of title after twenty years. *Kneller v. Lang*, (1893) 137 N. Y. 589, 33 N. E. 555, affirming 63 Hun 48, 17 N. Y. S. 443.

2. Possession under Title Adverse to Grantor

"In actual possession."—Under this section a deed is void only when the lands are, at the time of the delivery of the deed, in the actual possession of a person claiming under a title adverse to that of the grantor. *Sheridan v. Cardwell*, (1910) 141 App. Div. 854, 126 N. Y. S. 781; *Udell v. Stearns*, (1908) 125 App. Div. 196, 109 N. Y. S. 407; *Gilman v. Dolan*, (1906) 114 App. Div. 774, 100 N. Y. S. 186, affirmed without opinion (1908) 193 N. Y. 677, 87 N. E. 1119; *Cornwell v. Clement*, (1895) 87 Hun 50, 33 N. Y. S. 866; *Moody v. Moody*, (1878) 16 Hun 189; *Lakes Island Realty Co. v. McDermott*, (1916) 96 Misc. 37, 160 N. Y. S. 450. The term "actual possession," as a legal phrase, is put in opposition to the other phrase, possession in law, or constructive possession. Actual possession is the same as *pedis possessio* or *pedis positio*, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, and an occupation of it, as a real demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title and is called constructive possession. *Churchill v. Onderdonk*, (1874) 59 N. Y. 134. See also *Dawley v. Brown*, (1880) 79 N. Y. 390, reversing 9 Hun 461. Thus, a general assertion of ownership, without reference to a particular title or relying upon a title which would not give the party right to possession, is insufficient. *Fish v. Fish*, (1863) 39 Barb. 513.

What possession is equivalent to actual notice.—The possession which will be equivalent to actual notice to a subsequent purchaser, must be an actual, open and visible occupation, inconsistent with the title of the apparent owner by the record, not equivocal, occasional or for a special or temporary purpose, neither can it be consistent with the title of the apparent owner by the record. *Holland v. Brown*, (1893) 140 N. Y. 344, 35 N. E. 577; *Pope v. Allen*, (1882) 90 N. Y. 298; *Dawley v. Brown*, (1880) 79 N. Y. 390, reversing 9 Hun 461; *Brown v. Volkening*, (1876) 64 N. Y. 76; *Cook v. Travis*, (1859) 20 N. Y. 400, affirming 22 Barb. 338.

Necessity of color of title.—To avoid a deed under the section the adverse possession must be under a claim of some specific title, not necessarily a good title, but still a paper title as distinct from a general assertion of ownership, such as a title under some written instrument purporting to convey the lands to the claimant, or else some judgment, decree, or executed process of the court. *Green v. Horn*, (1913) 207 N. Y. 489, 101 N. E. 430, reversing 146 App. Div. 896, 131 N. Y. S. 1118; *Arents v. Long Island R. Co.*, (1898) 156 N. Y. 1, 50 N. E. 422, affirming 89 Hun 126, 34 N. Y. S. 1085. See also *Becker v. Church*, (1889) 115 N. Y. 562, 22 N. E. 748, affirming 42 Hun 258, 5 N. Y. St. Rep. 97; *Dawley v. Brown*, (1880) 79 N. Y. 390, reversing 9 Hun 461; *Matter of Public Parks Dept.*, (1878) 73 N. Y. 560, reversing 6 Hun 486; *Crary v. Goodman*, (1860) 22 N. Y. 170; *Wilson v. Boyce*, (1911) 143 App. Div. 782, 128 N. Y. S. 438; *Biglow v. Biglow*, (1899) 39 App. Div. 103, 56 N. Y. S. 794; *Finn v. Lally*, (1896) 1 App. Div. 411, 37 N. Y. S. 437; *Jones v. Hoyt*, (1895) 85 Hun 35, 32 N. Y. S. 625; *Smith v. Faulkner*, (1888) 48 Hun 186, 15 N. Y. St. Rep. 637; *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, (1885) 37 Hun 9; *Hoopes v. Auburn Water Works Co.*, (1885) 37 Hun 568, affirmed without opinion (1888) 109 N. Y. 635, 16 N. E. 681; *Swettenham v. Leary*, (1879) 18 Hun 284; *Nash v. Kemp*, (1878) 12 Hun 592; *Ten Eyck v. Craig*, (1874) 2 Hun 452, affirmed (1875) 62 N. Y. 406; *Eisemann v. Lapp*, (1902) 38 Misc. 14, 76 N. Y. S. 695; *Hughes v. Hughes*, (1894) 10 Misc. 180, 30 N. Y. S. 937; *Hallas v. Bell*, (1869) 53 Barb. 247; *Newton v. McLean*, (1863) 41 Barb. 285; *Fish v. Fish*, (1863) 39 Barb. 513; *Howard v. Howard*, (1854) 17 Barb. 663. But it has been held that it is not necessary that the claimant should have asserted in public, in so many words, his claim of ownership, as a claim of title may be made by acts as well as assertions. *Green v. Horn*, (1908) 128 App. Div. 686, 112 N. Y. S. 993. And possession of land under a deed given without right in the grantor, is adverse to the rightful owner, and a subsequent deed executed by the latter during such adverse possession is void. *Sands v. Hughes*, (1873) 53 N. Y. 287.

Possession by life tenant.—Where one enters into possession of premises under a conveyance giving him an estate for the life of another, and his estate ceases by the termination of that life, he then, being lawfully in possession, becomes the tenant by sufferance of the person entitled to the reversion, and cannot set up the defense of adverse possession, to an ejectment brought by one claiming title under a conveyance from the reversioner. *Learned v. Tallmadge*, (1856) 26 Barb. 443.

Adverse possession against remaindermen.—Until the precedent estate is terminated, giving the remaindermen the right of possession, no possession can be adverse to the remaindermen. *Clute v. New York Cent., etc., R. Co.*, (1890) 120 N. Y. 267, 24 N. E. 317. See also *Christie v. Gage*, (1877) 71 N. Y. 189, affirming 2 Thomp. & C. 344. And as against a reversioner there cannot be an adverse possession, as an adverse possession can be against only a person entitled to the possession. *Clarke v. Hughes*, (1852) 13 Barb. 147.

Adverse claim by cestui que trust.—A cestui que trust cannot claim to hold adversely under his own trustee. His occupation is like that of a tenant at will, and he cannot claim adverse to that of his trustee whose title is derived from him. *Newton v. McLean*, (1863) 41 Barb. 285.

Adverse possession by railroad company.—It has been held that a railroad company cannot make a conveyance of right of way, with a general description as through the grantor's premises, the foundation of a claim for adverse possession of property remote from that included in the conveyance. *Arents v. Long Island R. Co.*, (1898) 156 N. Y. 1, 50 N. E. 422, affirming 89 Hun 126, 34 N. Y. S. 1085. Where at the time of the execution of the deed under

which the plaintiff claimed, a railroad company was in possession of the land, claiming under a title adverse to that of plaintiff's grantor, the fact that the title was in the grantor and not in the railroad company, was held not to take the conveyance out of the condemnation of the statute. *Collins v. Buffalo, etc., R. Co.*, (1911) 145 App. Div. 148, 129 N. Y. S. 139. But where an abandoned right of way which was sold on foreclosure to plaintiff's predecessor in title was unfenced, but was a portion of a larger tract of agricultural lands which were fenced, it was held that acts of tillage, use, and enjoyment by the owner of the large tract could be shown to establish adverse possession of the abandoned right of way, and that it was not essential that a specific use of the site of the former right of way itself be shown. *Arnold v. New York, etc., R. Co.*, (1916) 173 App. Div. 764, 159 N. Y. S. 253.

Purchaser in bad faith.—Where a person in bad faith obtained from a stranger to the title a quitclaim deed, and went into possession thereunder, knowing that he had no title, it was held that the statute did not apply. *Lambert v. Huber*, (1898) 22 Misc. 462, 50 N. Y. S. 793.

Effect of improvements.—Actual possession and improvement of the premises, as owners are accustomed to possess and improve, without any recognition by the party in possession of a right in any other person, or disavowal of a title in himself, raises a presumption that he entered and holds possession as owner, and amounts, in law, to a claim of title. *Sherry v. Frecking*, (1855) 4 Duer 452.

Effect of filing map.—The mere fact that a survey has been made and a map filed is not a sufficient basis for an adverse possession under the statute. *Archibald v. New York Cent., etc., R. Co.*, (1899) 157 N. Y. S. 574, 52 N. E. 567, affirming 1 App. Div. 251, 37 N. Y. S. 336; *Kiowa Realty Co. v. Molenaar*, (1917) 98 Misc. 694, 165 N. Y. S. 131.

Payment of taxes as evidence of possession.—The payment of taxes is no evidence of possession, either actual or constructive, and does not show a claim of possession. *Archibald v. New York Cent., etc., R. Co.*, (1899) 157 N. Y. S. 574, 52 N. E. 567, affirming 1 App. Div. 251, 37 N. Y. S. 336.

Adverse possession as a question of law.—When there is no dispute as to the facts, the question of adverse possession is one of law. *Bowie v. Brale*, (1854) 3 Duer 35.

3. Boundary Line Questions

Disputed boundary line.—The rule has become elementary that the practical location of a boundary line and the acquiescence therein by the parties for more than twenty years is conclusive of the location of the line. *Smith v. Faulkner*, (1888) 48 Hun 186, 15 N. Y. St. Rep. 637. See also *Swettenham v. Leary*, (1879) 18 Hun 284. But the provisions of this section do not invalidate in whole or in part a grant where the grantor is possessed and delivers possession of the greater part of the land conveyed, but, by reason of a disputed boundary line, a small part is not in his actual possession at the delivery of his grant. *Danziger v. Boyd*, (1890) 120 N. Y. S. 628, 24 N. E. 482, affirming 55 Super. Ct. 537 mem. See also *Jones v. Hoyt*, (1895) 85 Hun 35, 32 N. Y. S. 625; *Clark v. Davis*, (1892) 28 Abb. N. Cas. 135, 19 N. Y. S. 191; *Allen v. Welch*, (1879) 18 Hun 226; *Zahn v. Dopp*, (1892) 19 N. Y. S. 863.

Party wall agreement.—Where a party wall agreement provided "that no part of the land upon which said wall, or any extension thereof, shall be constructed, shall pass to or be vested in either of the parties hereto by virtue of this agreement," and the plaintiff claimed no other rights than those secured to him by such agreement, it was held that he occupied the land in controversy without any adverse title to it whatsoever, and the statute did not apply. *Nash v. Kemp*, (1878) 12 Hun 592.

Monuments as controlling courses and distances.—The rule that monuments control courses and distances is merely a rule of construction to ascertain the intention of the parties. If that intention is otherwise plainly manifested, it need not be ignored in blind adherence to such rule. *Green v. Horn*, (1913) 207 N. Y. S. 489, 101 N. E. 430, reversing 146 App. Div. 896, 131 N. Y. S. 1118. See also *Brookman v. Kurzman*, (1883) 94 N. Y. S. 272; *Townsend v. Hayt*, (1873) 51 N. Y. S. 656, affirming 51 Barb. 334. The rule applies with less

force to artificial than to natural monuments, and where there is anything in the description showing that courses and distances are correct they will prevail. Thus, where it was apparent from the face of a deed that the intention was to convey a specific quantity of land, and the courses and distances included that precise quantity, while the description by monuments embraced more or less, it was held that the former controlled. *Higinbotham v. Stoddard*, (1878) 72 N. Y. 94, affirming 9 Hun 1. So, where parties to a deed merely refer by name to another parcel as fixing the starting point or boundary of the parcel conveyed, they must be deemed to have intended the true line and not the line of occupation of the parcel referred to; and particularly so, where the grantor owns only to the true line. *Green v. Horn*, (1913) 207 N. Y. 489, 101 N. E. 430, reversing 146 App. Div. 896, 131 N. Y. S. 1118.

Mistaken amount of acreage.—Where a party occupied one hundred and thirty acres of land, having title to one hundred acres only, but supposed the entire tract included one hundred acres, it was held that his possession was not adverse so as to render a conveyance by the true owner void. *Crary v. Goodman*, (1860) 22 N. Y. 170. See also *Harris v. Oakley*, (1888) 48 Hun 605 mem., 2 N. Y. S. 305.

4. *Riparian Rights*

Title of riparian owners.—The common-law rule as it obtains in this state is that, as between adjoining owners on non-navigable streams, rivers and inland lakes, each owner takes title *ad medium filum aquae*, in proportion to his line on the margin in front of his upland according to straight lines drawn at right angles between the side lines of his land on the shore and the center of the stream. *Calkins v. Hart*, (1916) 219 N. Y. 145, 113 N. E. 785, affirming 164 App. Div. 909, 148 N. Y. S. 1108; *Commonwealth Water Co. v. Brunner*, (1916) 175 App. Div. 153, 161 N. Y. S. 153. See also *Chism v. Smith*, (1916) 174 App. Div. 332, 160 N. Y. S. 813. And the riparian owners of lands adjoining fresh water non-navigable streams, taking title to the thread of the stream, as incident to the title, acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream. This is true also as to the fresh water navigable streams and small lakes within this state where the tide does not ebb and flow, save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. *Smith v. Rochester*, (1883) 92 N. Y. 463, 44 Am. Rep. 393.

Effect of section upon riparian rights.—A conveyance of land carries with it, as an appurtenant, the right to the flow of water in its natural channel over the land so conveyed. The statute does not apply to such appurtenant rights, and they pass to the grantee although a diversion of the water is made before the conveyance, and the right to such diversion is, at the time of the conveyance, claimed by the party causing it. *Corning v. Troy Iron, etc., Factory*, (1869) 40 N. Y. 191, affirming 39 Barb. 311. In the case of lands upon the banks of navigable waters, portions of the farm or lot which are not actually inclosed or cultivated but are so connected with the uplands that are, bring the whole under the possession of the person who actually occupies the inclosed and cultivated parts; and the manner in which lands on the sea shore are inclosed or occupied may be of such a character as to render the question of possession one of fact. *Holland v. Brown*, (1893) 140 N. Y. 344, 35 N. E. 577.

Accretion and erosion.—To give to a littoral proprietor title to land by accretion the increase must be by such imperceptible degrees that, although persons are able to perceive from time to time that the land has encroached on the sea line, they could not perceive the progress at the time it was made. While the title of such a proprietor is liable to be lost by erosion or submergence, the erosion to effect that result must be accompanied by a transportation of the land beyond the owner's boundary, and it may be returned by accretion, in which case the ownership temporarily lost may be regained; and so, land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity

of the land from being established. If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity and boundary on the firm land. And so if an island forms upon the land submerged, it belongs to the original owner. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tide-ways outside of the boundaries of property which has been the subject of individual ownership. The owners of adjacent uplands are entitled to lands formed by accretion or reliction in front of and contiguous to their property in certain proportions according to the formation of their respective shore lines. However such formations may be commenced or continued, the right of one owner of the uplands to follow and appropriate them ceases when the formation passes the line of his coterminous neighbor. *Mulry v. Norton*, (1885) 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206, affirming 29 Hun 660.

§ 261. Maintenance of telegraph or other electric wires raises no presumption of grant. Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension.

This section was derived from L. 1886, ch. 40, § 1.

Section 261 of the Real Property Law of 1896 is now covered by section 312.

Adverse possession of real property: see Code Civ. Pro., § 369 et seq.

Possession for more than twenty years.—The right to maintain forever a telephone line along a country highway has been held not to be established as against an abutting owner by proof of the company's peaceable possession of its route for more than twenty years, as under the section no lapse of time raises a presumption of grant or prescription for any perpetual right. *Andrews v. Delhi, etc., Telephone Co.*, (1901) 36 Misc. 23, 72 N. Y. S. 50, affirmed without opinion 66 App. Div. 616, 73 N. Y. S. 1129. And trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature and give separate successive causes of action from time to time as the injuries are perpetrated, barred only by the running of the statute against the successive trespasses. No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will effect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or in equity. *Galway v. Metropolitan E. R. Co.*, (1891) 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788.

Action of ejectment for removal.—The state can neither itself appropriate to its own special, continuous, and exclusive use, nor can it authorize a corporation so to appropriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires, and the question as to the legality of such a use is not affected by the fact that the legislature by statutory enactments has manifested its belief in the existence of such a right, or by the fact that adjoining owners have generally acquiesced in such a use. Where, therefore, a telegraph and telephone company, organized under the laws of this state (chap. 265, Laws of 1848, as amended by chap. 471, Laws of 1853), had, without the consent of an adjoining owner, who owned the fee of a highway, and without having acquired the right by condemnation proceedings, erected its poles in the highway and strung wires thereon for the purposes of its business, it was held that such a use of the highway was unlawful, and that an action of ejectment

was maintainable against it. *Eels v. American Telephone, etc., Co.*, (1894) 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, affirming 65 Hun 516, 20 N. Y. S. 600. And where, by a change in the route of a highway, a telephone line was left on and was a detriment to the land of an abutting owner, it was held that he could maintain ejectment to procure its removal, and where the company failed to prove that his mesne grantor and source of title ever consented in writing to the establishment of the line originally, and the company claimed no other consents, the plaintiff was entitled to judgment for removal. *Andrews v. Delhi, etc., Telephone Co.*, (1901) 36 Misc. 23, 72 N. Y. S. 50, affirmed without opinion 66 App. Div. 616, 73 N. Y. S. 1129.

Distinction between license, easement, and franchise.—See *Southampton Freeholders, etc. v. Jessup*, (1900) 162 N. Y. 122, 56 N. E. 538, reversing 10 App. Div. 456, 42 N. Y. S. 4; *California v. Central Pacific R. Co.*, (1887) 127 U. S. 1, 8 S. Ct. 1073, 32 U. S. (L. ed.) 150; *Long Island R. Co. v. Garvey*, (1899) 159 N. Y. 334, 54 N. E. 60, affirming 11 App. Div. 626, 42 N. Y. S. 155; *Greenwood Lake, etc., R. Co. v. New York, etc., R. Co.*, (1892) 134 N. Y. 435, 31 N. E. 874.

§ 262. **Conveyances with intent to defraud purchasers and incumbrancers void.** A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or incumbrancers, for a valuable consideration, of the same real property, rents or profits, is void as against such purchasers and incumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or incumbrancer, who, at the time of his purchase or incumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the fraud intended.

This section was derived from Real Property Law of 1896, § 226.

Section 262 of the Real Property Law of 1896 is now covered by section 313.

Powers as affected by fraud: see *supra*, § 181.

Fraud as question of fact: see *infra*, § 265.

Right of purchaser or incumbrancer for valuable consideration protected: see *infra*, § 266.

Fraudulent conveyances of property: see PENAL LAW, § 1170.

Distinction between actual and constructive notice.—In *Williamson v. Brown*, (1857) 15 N. Y. 354, the court said: "Notice is of two kinds, actual and constructive. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute." See also *Parker Mills v. Jacot*, (1861) 8 Bosw. 161.

As to necessity of inquiry by purchaser, see *infra*, § 263 note.

Conveyance prior to marriage in fraud of dower.—Where a husband prior to his marriage conveyed nearly all of his property to two daughters, who in turn executed and delivered to him a life lease of the same, all of which was done without the knowledge of the intended wife, who remained ignorant of the transaction until after her marriage, it was held, in an action by the wife, that the conveyance was void as to her inchoate right of dower, and she was adjudged to be entitled to such dower right in the property so conveyed. *Youngs v. Carter*, (1877) 10 Hun 194, affirming 1 Abb. N. Cas. 136.

As to elements of fraudulent disposition, presumption as to fraud, fraud as a question of fact, and burden of proof, see *infra*, § 263 note.

§ 263. Conveyances with intent to defraud creditors void. A conveyance or assignment in writing or otherwise, of an estate, interest, or existing trust in real property, or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, or a bond or other evidence of debt given, suit commenced or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed or defrauded.

This section was derived from Real Property Law of 1896, § 227.

Section 263 of the Real Property Law of 1896 is now covered by section 314.

Grant to one where consideration paid by another: see supra, § 94

Effect of insolvent assignment upon trust power: see supra, § 164.

Execution of power as affected by fraud: see supra, § 181.

Fraudulent intent as question of fact: see infra, § 265.

General assignments for benefit of creditors: see DEBTOR AND CREDITOR LAW, § 2 et seq.

Transfers of interest in personal property with intent to defraud creditors: see PERSONAL PROPERTY LAW, § 35.

Jurisdiction of Court of Appeals to set aside fraudulent conveyances: see Code Civ. Pro., § 191.

Fraudulent conveyances of property: see PENAL LAW, § 1170.

Knowingly receiving property conveyed to defraud creditors: see PENAL LAW, § 1172.

Elements of fraudulent disposition.—To constitute a disposition of property with intent to defraud, three things must concur: first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and third, it must be done with intent to defraud. Hoyt v. Godfrey, (1882) 88 N. Y. 669.

Presumption of fraud.—Fraud must be proved, and though it may be established as a deduction from facts which naturally and logically indicate its existence, it is not sufficient that the facts are ambiguous and as consistent with guilt as with innocence. If taken together they are consistent with an honest intent the fraud is not established. Roberts v. Buckley, (1895) 145 N. Y. 215, 39 N. E. 966, affirming 80 Hun 58, 29 N. Y. S. 873; Crook v. Rindskopf, (1887) 105 N. Y. 476, 12 N. E. 174, reversing 34 Hun 457; Shultz v. Hoagland, (1881) 85 N. Y. 464; Zimmer v. Hays, (1896) 8 App. Div. 34, 40 N. Y. S. 397. It is a fundamental principle that fraud must be proved and not assumed, and when a judgment is based upon a finding of fraud, to sustain the judgment, there must be evidence of fraud which justifies the finding. Barr v. Sofranski, (1909) 130 App. Div. 783, 115 N. Y. S. 533.

Fraud as question of fact.—Fraud is a matter of fact, and must be found as such on all the circumstances surrounding the transaction. Bulger v. Rosa, (1890) 119 N. Y. 459, 24 N. E. 853, affirming 53 Hun 239, 6 N. Y. S. 38; Billings v. Russell, (1886) 101 N. Y. 226, 4 N. E. 531, reversing 31 Hun 65; Schultz v. Hoagland, (1881) 85 N. Y. 464; Holden v. Burnham, (1875) 63 N. Y. 74, affirming 2 Hun 678, 5 Thomp. & C. 195; York Haven Paper Co. v. Place, (1900) 51 App. Div. 499, 64 N. Y. S. 715. And to invalidate a conveyance on the ground of fraud facts must be proved from which a legitimate inference of fraudulent intent can be drawn. Evidence simply justifying a suspicion is not sufficient. Jaeger v. Kelley, (1873) 52 N. Y. 274.

Effect of insolvency of transferor.—Where a person makes a voluntary conveyance or transfer of his property, and is insolvent at the time, such conveyance or transfer is fraudulent as against his creditors, even though the transferee was without notice or knowledge that the transferor was insolvent. Smith v. Reid, (1892) 134 N. Y. 568, 31 N. E. 1082; Coleman v. Burr,

(1883) 93 N. Y. 17, 45 Am. Rep. 160, affirming 25 Hun 239; *Lehrenkrauss v. Bonnell*, (1910) 138 App. Div. 493, 122 N. Y. S. 866, reversed on other grounds (1910) 199 N. Y. 240; *Truesdell v. Bourke*, (1898) 29 App. Div. 95, 51 N. Y. S. 409, affirmed without opinion (1900) 161 N. Y. 634, 57 N. E. 1127; *Bushby v. Berkeley*, (1914) 85 Misc. 178, 148 N. Y. S. 121; *Citizens' Nat. Bank v. Fonda*, (1896) 18 Misc. 114, 41 N. Y. S. 112.

Voluntary conveyance.—A voluntary conveyance by one indebted at the time is presumptively fraudulent. But the fact that a conveyance shows on its face that it was voluntary does not alone prevent a party from maintaining an action to set it aside as a cloud on his title. The conveyance cannot be judged fraudulent solely on the ground that it was voluntary, and extrinsic evidence is necessary to show an existing indebtedness of the grantor at the time of its execution. *Smith v. Reid*, (1892) 134 N. Y. 568, 31 N. E. 1082; *Jackson v. Badger*, (1888) 109 N. Y. 632, 16 N. E. 208.

Necessity of inquiry by purchaser.—"Where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." *Williamson v. Brown*, (1857) 15 N. Y. 354. To the same effect see *Kingsland v. Fuller*, (1899) 157 N. Y. 507, 52 N. E. 562, reversing 31 App. Div. 313, 53 N. Y. S. 624; *Gilmour v. Colcord*, (1904) 96 App. Div. 358, 89 N. Y. S. 689, modified on other grounds (1906) 183 N. Y. 342, 76 N. E. 273. In *Anderson v. Blood*, (1897) 152 N. Y. 285, 46 N. E. 493, 57 A. S. R. 515, affirming 86 Hun 244, 33 N. Y. S. 233, the court said: "A purchaser for a valuable consideration is entitled to be protected in his title and, in the absence of actual notice of fraud, it is necessary that the facts and circumstances, relied upon to charge him with knowledge of the fraud, should be of a character equivalent to notice. If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed." See also *Jacobs v. Morrison*, (1892) 136 N. Y. 101, 32 N. E. 552; *Bush v. Roberts*, (1888) 111 N. Y. 278, 18 N. E. 732, 7 A. S. R. 741; *Stearns v. Gage*, (1879) 79 N. Y. 102. Knowledge by the creditor of the existence of a conveyance, and of the indebtedness of the grantor, without knowledge that the conveyance was voluntary and without consideration, cannot be deemed knowledge of the facts constituting the fraud. Until he learns the fact last mentioned he cannot be said to have discovered the facts constituting the fraud. Although the main question of fact upon which the invalidity of a conveyance depends is the intent to defraud creditors, yet that intent is a mere conclusion or inference from other facts. Ignorance of the facts from which that conclusion is to be drawn is ignorance of the facts constituting the fraud, within the meaning of the statute. *Erickson v. Quinn*, (1872) 47 N. Y. 410, modifying 3 Lans. 299. But the fact of notice or knowledge need not be established by direct evidence. It may be inferred from circumstances, and established by proof of the vendee's knowledge of facts pointing to the fraudulent intent, or calculated to awaken suspicion: but where it appears that he was entirely innocent and free from any guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of the fraud. *Parker v. Conner*, (1883) 93 N. Y. 118, 45 Am. Rep. 178, reversing 47 Super. Ct. 522.

Existence of consideration.—It is not sufficient to condemn a conveyance of land as a fraud on creditors of the grantor that it was not founded upon a valuable consideration; other facts must be proved showing that the conveyance was made with a fraudulent intent. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Smith v. Eldredge*, (1913) 143 N. Y. S. 87. The want of consideration is simply a circumstance bearing upon the question of fraud. *Holden v. Burnham*, (1875) 63 N. Y. 74, affirming 2 Hun 678. §

Thomp. & C. 195. On the other hand the payment of a valuable consideration to a debtor upon a transfer by him of his property is not as a proposition of law inconsistent with an intent to defraud creditors, or of such knowledge thereof on the part of the purchaser as will avoid the conveyance. *Billings v. Russell*, (1886) 101 N. Y. 226, 4 N. E. 531, reversing 31 Hun 65; *Vogedes v. Beakes*, (1899) 38 App. Div. 380, 56 N. Y. S. 662; *Cain v. Snyder*, (1912) 76 Misc. 636, 135 N. Y. S. 443.

Parol proof of consideration.—It is proper to show by evidence dehors the deed itself, what the real consideration was, as "it is always open to a party where a nominal consideration is expressed to show what the real consideration was." *Medical College Laboratory v. New York University*, (1904) 178 N. Y. 153, 70 N. E. 467, affirming 76 App. Div. 48, 78 N. Y. S. 673. See also *King v. Union Trust Co.*, (1911) 148 App. Div. 110, 133 N. Y. S. 18, affirmed (1913) 208 N. Y. 566 mem.

Marriage as a consideration.—An oral agreement on the part of a woman to marry and pay the existing debts of her intended husband, in consideration that he convey to her a piece of real estate, if fully performed by the wife after marriage, is binding in equity upon the husband; and a conveyance made to her, in pursuance thereof, is upon a good and sufficient consideration. Such conveyance cannot be impeached by a subsequent creditor of the husband, who obtains judgment before the execution of the deed. *Dyggert v. Remerschnider*, (1865) 32 N. Y. 629, affirming 39 Barb. 417.

Antenuptial settlement.—An antenuptial settlement, though made with a fraudulent design by the settler, will not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement. *Prewit v. Wilson*, (1880) 103 U. S. 22, 26 U. S. (L. ed.) 360.

Conveyances between husband and wife.—An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105. See also *Schreyer v. Scott*, (1890) 134 U. S. 405, 10 S. Ct. 579, 33 U. S. (L. ed.) 955; *Neuberger v. Keim*, (1892) 134 N. Y. 35, 31 N. E. 268, affirming 53 Hun 60, 5 N. Y. S. 941; *Tanner v. Eckhardt*, (1905) 107 App. Div. 79, 94 N. Y. S. 1013; *Carr v. Breese*, (1880) 81 N. Y. 584, reversing 18 Hun 134; *Walworth Mfg. Co. v. Burton*, (1903) 82 App. Div. 637, 81 N. Y. S. 873; *Guy v. Craighead*, (1899) 40 App. Div. 260, 57 N. Y. S. 1070. But a conveyance by a husband to his wife will always be carefully scrutinized, and as to creditors it is open to the presumption of fraud. *Allee v. Slane*, (1898) 26 App. Div. 455, 50 N. Y. S. 55. It has been held that a husband cannot purchase property and place the same in his wife's name, and then prevent lienors or judgment creditors of his wife from treating the property as hers in case she deeds it back without consideration, if she has used the property as her own in creating the incumbrance. Nor can she transfer property which is in reality that of her husband in order merely to prevent her creditors from collecting their debts if she has incurred those debts through reliance upon her ownership, if this is known or ought to be known by her. *Osborn v. Peace*, (1914) 215 Fed. 181. So, where a debtor conveyed, without consideration, certain real estate to a third person, with a view of having the title vested in his wife, to whom it was conveyed by such third person, and the property remaining to the debtor was entirely insufficient to pay his debts, it was held that the evidence was sufficient to sustain a finding that the conveyance was made for the purpose of hindering, delaying and defrauding creditors. *Cole v. Tyler*, (1875) 65 N. Y. 73. See also *Holden v. Burnham*, (1875) 63 N. Y. 74, affirming 2 Hun 678, 5 Thomp. & C. 195.

Retention of possession as badge of fraud.—The retention of possession is sometimes not only a badge of fraud, but raises a presumption of fraud against creditors. The question of fraud under the statute is one of fact, and it arises when the vendee is required to show a valid excuse for leaving the property in the vendor's possession. *Vogedes v. Beakes*, (1899) 38 App. Div. 380, 56 N. Y. S. 662; *Sommerse v. Cottentin*, (1898) 26 App. Div. 241, 40 N. Y. S. 652.

Accommodation indorser as debtor.—Where a bank discounted a note upon the faith of an accommodation indorser and the note was subsequently renewed, it was held that the indorser stood in the relation of a debtor to the bank, which could therefore, as a creditor, attack a conveyance made by the indorser before his liability as such became actually fixed. *Citizens' Nat. Bank v. Fonda*, (1896) 18 Misc. 114, 41 N. Y. S. 112.

Fraudulent confession of judgment.—There is no distinction so far as this section is concerned between an assignment in fraud of creditors and a fraudulent confession of judgment. *H. B. Chadlin Co. v. Arnheim*, (1895) 87 Hun 236, 33 N. Y. S. 1037.

Assignee for creditors as purchaser for value.—An assignee in trust for creditors or a grantee in a voluntary conveyance does not occupy the position of a purchaser for value, and his innocence of any fraudulent intent will not protect his title if, for any reason, it may be adjudged fraudulent as to creditors. *Young v. Heermans*, (1876) 66 N. Y. 374, modifying 5 Hun 121.

As to the status of assignees for creditors generally, see DEBTOR AND CREDITOR LAW, § 14 and note.

Conveyances fraudulent as to subsequent creditors.—If a conveyance is fraudulent as to existing creditors it may also be attacked by subsequent creditors, for the statute makes a conveyance void as against every person "hindered, delayed or defrauded." *Dewey v. Moyer*, (1878) 72 N. Y. 70, affirming 9 Hun 473, which was affirmed by 103 U. S. 301, 26 U. S. (L. ed.) 384; *Wahlheimer v. Truslow*, (1905) 106 App. Div. 73, 94 N. Y. S. 137; *O'Brien v. Whigam*, (1896) 9 App. Div. 113, 41 N. Y. S. 40. And it makes no difference whether the debt is or is not due at the time of the conveyance. *Citizens' Nat. Bank v. Fonda*, (1896) 18 Misc. 114, 41 N. Y. S. 112. See also *Murphy v. Briggs*, (1882) 89 N. Y. 446, affirming 23 Hun 95.

Conveyance of homestead.—Where a brother delivered to his brother-in-law a deed to his sisters, of the homestead, and the sisters thereafter remained in exclusive possession, although he paid the taxes and also once or more included the land in a statement of his assets, the court, in view of the beneficial nature of the instrument, concluded that a delivery of the deed had been established as against judgment creditors of the grantor; and also held that a delay of eight years in recording the deed was not with a fraudulent purpose, but probably resulted from inattention upon the part of the grantees. *Philadelphia, etc., Coal, etc., Co. v. Devoy*, (1898) 25 Misc. 640, 56 N. Y. S. 315.

Transfer in trust for debtor.—A transfer by a debtor of all his property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts, is, per se, conclusive evidence of fraud as to existing creditors; no extrinsic circumstance or evidence aliunde is necessary to establish a fraudulent intent. It is void as against such creditors both as to the real and the personal estate and the innocence of any fraudulent intent, upon the part of the transferee, will not protect his title. *Young v. Heermans*, (1876) 66 N. Y. 374, modifying 5 Hun 121. See also *Ciowe v. Seavey*, (1913) 208 N. Y. 496, 102 N. E. 521, affirming 151 App. Div. 912, 135 N. Y. S. 1105.

Agreement to reconvey.—A conveyance taken in payment of a debt, with the understanding between the parties that the land is to be reconveyed to the wives of the grantors upon payment of the debt and interest, has been held fraudulent as against creditors. *Harris v. Osnowitz*, (1898) 35 App. Div. 594, 55 N. Y. S. 172. See also *Young v. Heermans*, (1876) 66 N. Y. 374, modifying 5 Hun 121; *Robinson v. Stewart*, (1854) 10 N. Y. 189.

Mortgage given prior to filing petition in bankruptcy.—A mortgage given and received in fraud of creditors, or to hinder, delay, or defraud creditors is invalid as to creditors. But a mortgage not given and received for such a purpose, if there is a good present consideration and it is given more than four months prior to the filing of the petition in bankruptcy in New York, is good and valid as to creditors and the trustee in bankruptcy, whether recorded or not. *In re Mosher*, (1915) 224 Fed. 739.

Burden of proof.—The person assailing the conveyance assumes the burden of showing that it was executed in bad faith and left the grantor insolvent and without ample property to pay his existing debts and liabilities. *Roberts v. Buckley*, (1895) 145 N. Y. 215, 39 N. E. 966, affirming 80 Hun 58, 29 N. Y. S. 873; *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Pease v.*

Batten, (1890) 56 Hun 643 mem., 9 N. Y. S. 621. But on a transfer by an insolvent debtor for an expressed nominal consideration, it is necessary for the person who receives such transfer to show his good faith and that he is a purchaser for valuable consideration, in order to avoid the taint which affects the transaction. *Hyde v. Wolf*, (1898) 31 App. Div. 125, 52 N. Y. S. 764. Where a grantee denies the fraud and sets up that he is a purchaser for a valuable consideration, the party attacking the conveyance must not only prove that the conveyance is not founded upon a valuable consideration, but, if it is voluntary, he is bound to prove in addition that as a matter of fact it is fraudulent and made with fraudulent intent. If it is made to appear that the purchase is for a valuable consideration, then it is necessary for him to prove, not only that the grantor made the conveyance with intent to hinder, delay and defraud his creditors, but that the grantee had previous notice of the fraudulent intent of his grantor. *Weiser v. Kling*, (1899) 38 App. Div. 266, 57 N. Y. S. 48. See also *Fitzpatrick v. Fox*, (1903) 80 App. Div. 345, 80 N. Y. S. 677.

Power of court to direct verdict.—The statutes relating to fraudulent conveyances do not interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument of transfer or by uncontradicted oral evidence. *Bulger v. Rosa*, (1890) 119 N. Y. 459, 24 N. E. 853, affirming 53 Hun 239, 6 N. Y. S. 38.

§ 264. Conveyances void as to creditors, purchasers and incumbrances, void as to heirs and assigns. A conveyance, charge, instrument or proceeding, declared by this article to be void as against creditors, purchasers or incumbrancers, is equally void as against their heirs, successors, personal representatives or assigns.

This section was derived from Real Property Law of 1896, § 228.

Section 264 of the Real Property Law of 1896 is now covered by section 315.

Estate which passes by grant or devise: see supra, § 245.

Cited.—This section was cited in *In re Mosher*, (1915) 224 Fed. 739; *Bushby v. Berkeley*, (1914) 85 Misc. 178, 148 N. Y. S. 121.

§ 265. Fraudulent intent, question of fact. The question of fraudulent intent in a case arising under this article, shall be deemed a question of fact and not of law; and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers or incumbrancers, solely on the ground that it was not founded on a valuable consideration.

This section was derived from Real Property Law of 1896, § 229.

Section 265 of the Real Property Law of 1896 is now covered by section 316.

Grant to one where consideration paid by another: see supra, § 94.

Similar provision concerning conveyance of personal property: see PERSONAL PROPERTY LAW, § 37.

Rule prior to Revised Statutes.—Prior to the Revised Statutes the question of fraudulent intent was frequently held to be a question of law. *Jackson v. Seward*, (1825) 5 Cow. 67; *Hanford v. Archer*, (1842) 4 Hill 271. See also *Manchester v. Tibbetts*, (1890) 121 N. Y. 219, 24 N. E. 204, 18 A. S. R. 816; *Babcock v. Eckler*, (1862) 24 N. Y. 623. This section of the statute, declaring that the question of fraudulent intent in all cases, arising under the provisions of that chapter, should be deemed a question of fact and not of law, was introduced for the express purpose of letting in proof in such cases to rebut the legal presumption of fraudulent intent arising from the fact that the conveyance was not founded upon a valuable consideration. *Hanford v. Archer*, (1842) 4 Hill 271.

Voluntary conveyance.—The fact that a conveyance shows upon its face that it was voluntary does not alone prevent a party from maintaining an action to set it aside as a cloud on his title. The conveyance cannot be judged fraudulent solely upon the ground that it was voluntary, and extrinsic evidence is necessary to show an existing indebtedness of the grantor at the time of its execution. But the rule is well settled that a voluntary conveyance by one indebted at the time is presumptively fraudulent. *Smith v. Reid*, (1892) 134 N. Y. 568, 31 N. E. 1082; *Jackson v. Badger*, (1888) 109 N. Y. 632, 16 N. E. 208; *Lehrenkrauss v. Bonnell*, (1910) 138 App. Div. 493, 122 N. Y. S. 866, reversed on other grounds (1910) 199 N. Y. 240; *Busby v. Berkeley*, (1914) 85 Misc. 178, 148 N. Y. S. 121; *Citizens' Nat. Bank v. Fonda*, (1896) 18 Misc. 114, 41 N. Y. S. 112.

Consideration as element of fraud.—The fact of the payment of a valuable consideration upon a transfer of property is not, as a proposition of law, inconsistent with the existence of an intent to defraud, and in the application of this principle no distinction can be made between the consideration furnished by an existing debt and one arising in any other manner. It is undoubtedly evidence, and usually strong evidence, of the intent with which the conveyance is made, but is simply a circumstance to be considered by the court in determining the question of intent. The statute itself declares all conveyances made with a fraudulent intent absolutely void, except in the case of those made upon a good consideration and in ignorance on the part of the purchaser of the fraudulent design of his grantor. It contains, therefore, the strongest implication that the payment of a valuable consideration is not inconsistent with the existence of an intent to defraud, and of such knowledge on the part of the purchaser of the fraudulent design, as will avoid a conveyance made to him, even though accompanied by the payment of an adequate consideration. *Billings v. Russell*, (1886) 101 N. Y. 226, 4 N. E. 531, reversing 31 Hun 65; *Smith v. Eldredge*, (1913) 143 N. Y. S. 87; *Cain v. Snyder*, (1912) 76 Misc. 636, 135 N. Y. S. 443; *Fuller v. Brown*, (1894) 76 Hun 557, 28 N. Y. S. 189. A valuable consideration does not necessarily mean full value. The statute is complied with if the sum is a substantial amount when compared with the value of the property transferred; and although inadequate, it will be held sufficient to sustain the grantee's title, unless he is chargeable with notice of the fraudulent intent of the grantor. *Truesdell v. Sarles*, (1887) 104 N. Y. 164, 10 N. E. 139; *Greenough v. Greenough*, (1897) 21 Misc. 727, 47 N. Y. S. 1096, affirmed without opinion 32 App. Div. 631, 53 N. Y. S. 1104; *Wilmerding v. Jar-mulowsky*, (1895) 85 Hun 285, 32 N. Y. S. 983. Although the main question of fact upon which the invalidity of a conveyance depends is the intent to defraud creditors, yet that intent is a mere conclusion or inference from other facts. Ignorance of the facts from which that conclusion is to be drawn is ignorance of the facts constituting the fraud, within the meaning of the statute. *Erickson v. Quinn*, (1872) 47 N. Y. 410, modifying 3 Laus. 299; *Fuller v. Brown*, (1894) 76 Hun 557, 28 N. Y. S. 189.

Conveyances between husband and wife.—An owner of real estate can make a voluntary settlement thereof upon his wife or children without any consideration, provided he has sufficient property remaining to satisfy all just claims of his creditors. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Babcock v. Eckler*, (1862) 24 N. Y. 623; *Smith v. Eldredge*, (1913) 143 N. Y. S. 87; *Cain v. Snyder*, (1912) 76 Misc. 636, 135 N. Y. S. 443. See also *Coleman v. Burr*, (1883) 93 N. Y. 17, 45 Am. Rep. 160, affirming 25 Hun 239. And a conveyance in consideration of blood and natural affection, though by one indebted at the time, is *prima facie* only, and not conclusively, fraudulent. *Goff v. Alexander*, (1897) 20 Misc. 498, 45 N. Y. S. 737; *Seward v. Jackson*, (1826) 8 Cow. 406. See also *King v. Union Trust Co.*, (1911) 148 App. Div. 110, 133 N. Y. S. 18, affirmed (1913) 208 N. Y. 566 mem.; *Bogert v. Hess*, (1900) 50 App. Div. 253, 63 N. Y. S. 977.

When a wife by proper and sufficient proof shows that her husband owes her, she is entitled to the same remedies and has the same standing to enforce any security for the payment of the debt that she may have received as any other creditor. *Manchester v. Tibbetts*, (1890) 121 N. Y. 219, 24 N. E. 304, 18 A. S. R. 816. But where no change of possession accompanies a transfer from husband to wife it is presumptively fraudulent. *Vogedes v. Beakes*, (1899) 38 App. Div. 380, 56 N. Y. S. 662.

Action by judgment creditor.—A judgment creditor cannot be deprived of his legal right to enforce collection of his judgment against the lands of his debtor by a fraudulent conveyance thereof prior to the entry of judgment, nor can be by such conveyance be forced to pursue an equitable remedy for the collection of his debt instead of a legal one. Notwithstanding the fraudulent conveyance, while the title remains in the fraudulent grantee the lien of the judgment remains, the judgment creditor may sell the land under execution on his judgment, and the purchaser may impeach the conveyance in a suit at law to recover possession, or, if he can gain possession, defend the title thus acquired against the fraudulent grantee or those claiming under him. Such a purchaser in possession may invoke the aid of a court of equity to remove the apparent cloud on his title caused by the fraudulent conveyance, and to have it discharged from the record, when its invalidity does not appear upon its face. *Smith v. Reid*, (1892) 134 N. Y. 568, 51 N. E. 1082. A person who recovers a judgment subsequently to a transfer by the judgment debtor, in an action of tort upon a liability existing at the time it was made, is a subsequent creditor. *Fuller v. Brown*, (1894) 16 Hun 557, 28 N. Y. S. 189.

Assignment for benefit of creditors.—An assignment for the benefit of creditors must be interpreted like other instruments according to the intent of the parties, and if possible such a construction given it as will sustain rather than defeat it, and the onus is upon the party charging fraud in such an instrument to show affirmatively some illegal provision, or some act consciously and purposely done which is inconsistent with an honest purpose. *Roberts v. Buckley*, (1895) 145 N. Y. 215, 39 N. E. 966, affirming 80 Hun 43, 29 N. Y. S. 873.

As to assignments for creditors generally, see **DEBTOR AND CREDITOR LAW**, § 2 et seq.

Presumption of fraud.—It is a fundamental principle that fraud must be proved and not assumed, and when a judgment is based upon a finding of fraud, to sustain the judgment there must be evidence of fraud which justifies the finding. *Barr v. Sofranski*, (1909) 130 App. Div. 783, 115 N. Y. S. 533.

Burden of proof.—As a general proposition the presumptions of law are in favor of good faith, and the burden of showing the contrary is upon him who alleges bad faith. *Woodworth v. Sweet*, (1872) 51 N. Y. 8. See also *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Manchester v. Tibbets*, (1890) 121 N. Y. 219, 24 N. E. 304, 18 A. S. R. 816; *Willis v. Willis*, (1903) 79 App. Div. 9, 79 N. Y. S. 1028; *Maasch v. Grauber*, (1901) 58 App. Div. 560, 69 N. Y. S. 187; *Smith v. Eldredge*, (1913) 143 N. Y. S. 87; *Sumner v. Skinner*, (1894) 80 Hun 201, 30 N. Y. S. 4, affirmed without opinion (1896) 149 N. Y. 597, 44 N. E. 1128; *Carr v. Johnson*, (1891) 59 Hun 620 mem., 32 N. Y. S. 799.

Power of court to direct verdict.—The statute does not interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument or by uncontradicted verbal evidence. *Bulger v. Rosa*, (1890) 119 N. Y. 459, 24 N. E. 853, affirming 53 Hun 239, 6 N. Y. S. 38.

Cited.—This section was cited in *In re Mosher*, (1915) 224 Fed. 739; *Tanner v. Eckhardt*, (1905) 107 App. Div. 79, 94 N. Y. S. 1013.

§ 266. Rights of purchaser or incumbrancer for valuable consideration protected. This article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

This section was derived from Real Property Law of 1896, § 230.

Section 266 of the Real Property Law of 1896 is now covered by section 317.

Transferee of trust property protected: see *supra*, § 104.

Conveyances with intent to defraud purchasers, incumbancers and creditors: see *supra*, §§ 262, 263.

Protection to purchasers of personal property: see **PERSONAL PROPERTY LAW**, § 40.

Knowingly receiving property conveyed to defraud creditors: see **PENAL LAW**, § 1172.

"Previous notice of the fraudulent intent."—A purchaser of land for a valuable consideration is entitled to be protected in his title, and in the absence of actual notice of fraud it is necessary, in order to defeat his claim to be a bona fide purchaser, that the facts and circumstances relied upon to charge him with knowledge of the fraud should be of a character equivalent to notice. But if the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry and to excite the suspicion of an ordinarily prudent person, and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry as suggested by the facts would have revealed. *Anderson v. Blood*, (1897) 152 N. Y. 285, 46 N. E. 493, 57 A. S. R. 515, affirming 86 Hun 244, 33 N. Y. S. 233. See also *Jacobs v. Morrison*, (1892) 136 N. Y. 101, 32 N. E. 552; *Bush v. Roberts*, (1878) 111 N. Y. 278, 18 N. E. 732, 7 A. S. R. 741; *Stearns v. Gage*, (1879) 79 N. Y. 102; *Cain v. Snyder*, (1912) 76 Misc. 636, 135 N. Y. S. 443. The fact of notice or knowledge need not be established by direct evidence. It may be inferred from circumstances, and established by proof of the vendee's knowledge of facts pointing to the fraudulent intent or calculated to awaken suspicion; but where it appears that he was entirely innocent and free from any guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of the fraud. *Parker v. Conner*, (1883) 93 N. Y. 118, 45 Am. Rep. 178, reversing 47 Super. Ct. 522. As was said in *Ross v. Caywood*, (1897) 16 App. Div. 591, 44 N. Y. S. 985, reversed on other grounds (1900) 162 N. Y. 259, 56 N. E. 629: "Before a vendee can be held responsible for the fraud of his vendor, it must be shown that he had some actual knowledge or notice of such fraud; it expressly recognizes the rule which has long obtained, that knowledge or notice, in order to be deemed direct and actual, need not be established by positive evidence, but may be inferred from circumstances like any other fact." See also *McNally v. Cohoes*, (1891) 127 N. Y. 350, 27 N. E. 1043, affirming 53 Hun 202, 6 N. Y. S. 842. So a debtor may dispose of his property with the intent to defraud his creditors and yet give a good title to one who pays value and has no knowledge of, and does not participate in, the fraud. *Zoeller v. Riley*, (1885) 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157.

Duty of purchaser as to inquiry.—The question, in determining the bona fides of a purchaser for a valuable consideration of land alleged to have been sold in fraud of the rights of third parties, is not whether the purchaser could have discovered the existence of any fraud by an inquiry; it is whether, acting as an ordinarily prudent person would have done, he was called upon under the circumstances to make inquiry. *Anderson v. Blood*, (1897) 152 N. Y. 285, 46 N. E. 493, 57 A. S. R. 515, affirming 86 Hun 244, 33 N. Y. S. 233; *Williamson v. Brown*, (1857) 15 N. Y. 354.

Assignee for creditors as "purchaser."—An assignee in trust for creditors is not a purchaser for a valuable consideration, and no innocence on his part will uphold the assignment if it could otherwise, for any reason, be adjudged fraudulent and void. *Young v. Heermans*, (1876) 66 N. Y. 374, modifying 5 Hun 121; *Smith v. Felton*, (1871) 43 N. Y. 419; *Griffin v. Marquardt*, (1858) 17 N. Y. 28; *H. B. Claflin Co. v. Arnheim*, (1895) 87 Hun 236, 33 N. Y. S. 1037.

As to fraudulent assignments generally, see **DEBTOR AND CREDITOR LAW**, § 3 note.

Consideration as affecting fraud.—The payment of a valuable consideration to a debtor upon a transfer by him of his property is not as a proposition of law inconsistent with the existence of an intent on his part to defraud his creditors, or of such knowledge thereof on the part of the purchaser as will avoid the conveyance. *Cain v. Snyder*, (1912) 76 Misc. 636, 135 N. Y. S. 443; *Vogedes v. Beakes*, (1899) 38 App. Div. 380, 56 N. Y. S. 662.

This section expressly impeaches the title of a person who buys for value with notice of fraudulent intent, and the purchaser for value without notice is the only person protected from the operation of the statute. If a debtor makes an assignment or conveyance or suffers judgment with intent to hinder, delay, and defraud creditors, his act is voidable at the instance of creditors as against all the world except a bona fide purchaser for value; and one cannot be a bona fide purchaser unless he is ignorant of the fraudulent intent. *H. B. Claflin Co. v. Arnheim*, (1895) 87 Hun 236, 33 N. Y. S. 1037. A creditor assailing a transfer of property as fraudulent may succeed by simply showing a fraudulent intent on the part of the vendor or on the part of the vendee; but if the vendee shows that he paid a valuable consideration for the property transferred to him there must be proof also of a fraudulent intent on the part of the vendee or that he had notice of the vendor's fraudulent intent, which proof may be made by circumstances and proper and legitimate inferences to be drawn from the whole transaction. *Billings v. Russell*, (1886) 101 N. Y. 226, 4 N. E. 531, reversing 31 Hun 65; *Starin v. Kelly*, (1882) 88 N. Y. 418, affirming 47 Super. Ct. 288; *Gilmour v. Colcord*, (1904) 96 App. Div. 358, 89 N. Y. S. 689, modified on other grounds (1906) 183 N. Y. 342, 76 N. E. 273.

Consideration of one dollar.—It has been held that a consideration of one dollar expressed in a deed, although actually paid to the grantor, is insufficient to make the grantee a purchaser for a valuable consideration. *Ten Eyck v. Witbeck*, (1892) 135 N. Y. 40, 31 N. E. 994, 31 A. S. R. 809; *Dunn v. Dunn*, (1912) 151 App. Div. 800, 136 N. Y. S. 282. See also *Fuller v. Brown*, (1894) 76 Hun 557, 28 N. Y. S. 189.

Consideration of deed from parent to child.—A deed from a parent to his child does not require any pecuniary consideration to support it. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Loeschigk v. Hatfield*, (1873) 51 N. Y. 660, affirming 5 Robt. 26; *Russ v. Maxwell*, (1904) 94 App. Div. 107, 87 N. Y. S. 1077.

Purchaser from assignee under fraudulent assignment.—One who purchases real estate from an assignee for the benefit of creditors, under an assignment fraudulent and void upon its face, is a purchaser for a valuable consideration when it appears that at the time of the purchase and of the payment of the purchase money by him, he had no actual knowledge of any fact relating to any fraud in the assignment, or of any fraudulent intent on the part of the assignor, that he did not obtain actual knowledge of any such fact or intent until after he had received the deed from the assignee, that he paid a fair price for the property, and that he had not read or examined the assignment. Nor does the fact that the purchase was made at a general assignee's sale, charge such purchaser with constructive notice of the fraudulent intent of the assignor, within the meaning of the statute. *Wilson v. Marion*, (1895) 147 N. Y. 589, 42 N. E. 190, affirming 72 Hun 639 mem., 25 N. Y. S. 1066.

As to fraudulent assignments generally, see **DEBTOR AND CREDITOR LAW**, § 3 note.

Debt created after conveyance.—An action may be maintained by a judgment creditor to set aside a conveyance of lands made by the debtor, as made with intent to defraud the creditor, although the debt was created after the conveyance, where it appears that the debtor obtained credit on the strength of his ownership of the lands, then transferred them with intent to defraud his creditors, and thereafter continued in possession and seeming ownership, and kept up his credit thereby. In such a case a transfer may be made with intent to defraud a subsequent as well as a prior creditor; and, the fraudulent intent appearing, the conveyance will be declared void. *Shand v. Hanley*, (1877) 71 N. Y. 319.

Effect of recording.—The recording of an incumbrance upon real property is notice to subsequent purchasers of incumbrancers only and has no retrospective effect upon prior lienors, and the recording of a deed or mortgage is constructive notice only to those who subsequently acquire some interest or right in the property under the grantor or mortgagor. The sole object and effect of the recording acts is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, and liens which are not first recorded. In re *Moshier*, (1915) 224 Fed. 739; *Ackerman v. Hunsicker*, (1881) 85 N. Y. 43, 39 Am. Rep. 621, reversing 21 Hun 53.

§ 267. Conveyances with power to revoke, determine or alter.

A conveyance of, or charge on, an estate or interest in real property, containing a provision for the revocation, determination or alteration of the estate or interest, or any part thereof, at the will of the grantor, is void, as against subsequent purchasers and incumbrancers, from the grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by the grantor, by virtue of the power reserved or expressed in the prior conveyance or charge. Where a power to revoke a conveyance of real property or the rents and profits thereof, and to reconvey the same, is given to any person, other than the grantor in such conveyance, and such person thereafter conveys the same real property, rents or profits to a purchaser or incumbrancer for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared. If a conveyance to a purchaser or incumbrancer, under this section, be made before the person making it is entitled to execute his power of revocation, it is nevertheless valid, from the time the power of revocation actually vests in such person, in the same manner, and to the same extent, as if then made.

This section was derived from Real Property Law of 1896, § 231.

Section 267 of the Real Property Law of 1896 is now covered by section 318.

Reservation of power and effect of power to revoke: see *supra*, §§ 144, 145.

Omission to recite power: see *supra*, § 175.

Revocation by parol.—Parol evidence offered to show that the parties treated a valid deed as a nullity is not admissible, as such title cannot be divested except by an instrument in writing under seal. *Adams v. Adams*, (1906) 114 App. Div. 390, 100 N. Y. S. 145, affirmed without opinion (1907) 187 N. Y. 547, 80 N. E. 1104.

Form of instrument to revoke power.—While section 173, *supra*, requires that the consent of a necessary person to the execution of a power must be expressed in the instrument by which the power is executed, or in a written certificate thereon, executed and acknowledged in like manner as deeds are required to be executed, yet where the act of revocation as between the parties expresses a clear intention to revoke and the rights of third persons are in nowise affected and the trust instrument in itself does not provide the particular form in which the revocation shall be executed, an instrument which clearly expresses the intention to revoke and is sufficient to accomplish such a purpose will be regarded as working such a result, even though it is not executed in the particular form required by the statute. *Barnard v. Gantz*, (1893) 140 N. Y. 249, 35 N. E. 430; *Schreyer v. Schreyer*, (1905) 101 App. Div. 456, 91 N. Y. S. 1065, affirmed (1905) 182 N. Y. 555, 75 N. E. 1134.

Reservation in fraud of creditors.—It has been held that a person cannot place his property in trust, with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arise after the creation of the trust. *Schenck v. Barnes*, (1898) 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395, affirming 25 App. Div. 153, 49 N. Y. S. 222.

§ 268. Disaffirmance of fraudulent act by executor and others.

An executor, administrator, receiver, assignee or other trustee, may, for the benefit of creditors, or of others interested in real property held in trust, disaffirm, treat as void and resist any act done or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate or property; and a person who fraudulently receives, takes, or in any manner interferes with the real property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver or other trustee for the same, or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim or demand exceeding one hundred dollars against such deceased, may, for the benefit of creditors or others interested in the real property of such deceased, disaffirm, treat as void, and resist any act done or conveyance, transfer or agreement made by such deceased in fraud of the rights of any creditor, including himself, and may maintain an action to set aside such act, conveyance, transfer or agreement, without having first obtained a judgment on such claim or demand; but the same, if disputed, may be established on the trial. The judgment in such action may provide for the sale of the premises or property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

This section was derived from Real Property Law of 1896, § 232.

Section 268 of the Real Property Law of 1896 is now covered by section 319.

Disaffirmance of fraudulent acts relating to personal property: see PERSONAL PROPERTY LAW, § 19.

Section as declaratory of former rule.—It has always been the rule that a creditor of an insolvent decedent might maintain an action to set aside as fraudulent a voluntary conveyance or transfer made in the lifetime of the decedent, and the statute has made no change in the law except to confer the right upon the representative or assignee to recover property fraudulently transferred by his insolvent intestate or assignor, for the benefit of all the creditors, which right did not exist previously to the statute. *Truesdell v. Bourke*, (1898) 29 App. Div. 95, 51 N. Y. S. 409, affirmed without opinion (1900) 161 N. Y. 634, 57 N. E. 1127. See also *Johnson v. Johnson*, (1892) 63 Hun 1, 17 N. Y. S. 570.

What plaintiff may show.—The plaintiff in a suit to set aside conveyances of real and personal property on the ground that they were made to defraud creditors, is entitled to show facts and circumstances tending to prove as alleged in the complaint that the conveyances were made without consideration by the grantor while largely indebted to others, and that he died insolvent. Facts and circumstances leading to the conclusion of fraud may be proved without specifically alleging them in the complaint, and the creditor of a decedent may sue on his own behalf and for the benefit of all other creditors of the decedent to set aside conveyances formerly made by the decedent for the purpose of defrauding creditors without a prior demand on the debtor's executor to bring the suit. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105; *Calkins v. Stedman*, (1911) 146 App. Div. 202, 130 N. Y. S. 932.

Right of creditor to sue.—The statute provides that an action may be brought by executors, administrators, assignees, or other trustees, to reach

property transferred in fraud of creditors, yet if such officer or trustee refuses to do so a creditor beneficially interested may bring the action, including in it as a party defendant, him so refusing. *National Tradesmen's Bank v. Wetmore*, (1891) 124 N. Y. 241, 26 N. E. 548. See also *Harvey v. McDonnell*, (1889) 113 N. Y. 526, 21 N. E. 695, reversing 48 Hun 409, 1 N. Y. S. 83. But, while under this section an action may be maintained by a creditor to set aside a conveyance made by a deceased person as fraudulent, such action must be brought, not for himself individually, but on behalf of all the creditors of the deceased. *Matteson v. Paiser*, (1903) 173 N. Y. 404, 66 N. E. 110, modifying 56 App. Div. 91, 67 N. Y. S. 612; *Lichtenberg v. Herdfelder*, (1886) 103 N. Y. 302, 8 N. E. 526, affirming 33 Hun 57.

Action by executor or administrator.—The provisions of this section are in effect that any executor or administrator may, for the benefit of creditors interested in the estate or property, disaffirm, treat as void, and resist all acts done, transfers, and agreements made in fraud of the rights of creditors, and that every person who shall in fraud of the rights of creditors have received, taken, or in any manner interfered with the estate, property or effects of any deceased person, shall be liable in the proper action to the executors or administrators for the same or the value of any property or effects so received or taken. *National Bank v. Levy*, (1891) 127 N. Y. 549, 28 N. E. 592.

While the section confers power upon executors and administrators to protect creditors from fraud, it confers no power upon them to bring an action to remove a cloud upon title. *Rosseau v. Bleau*, (1892) 131 N. Y. 177, 30 N. E. 52, 27 A. S. R. 578, reversing 60 Hun 259, 14 N. Y. S. 712. An executor or administrator can disaffirm only transactions made in fraud of creditors and others interested in the estate or property. *Lore v. Dierkes*, (1884) 16 Abb. N. Cas. 47. See also *Miller v. Davis*, (1891) 60 Hun 198, 14 N. Y. S. 725, 20 Civ. Pro. 414; *Barton v. Hosner*, (1881) 24 Hun 467.

Right of assignee for benefit of creditors.—While an assignment for the benefit of creditors remains in force, the right to assail previous conveyances executed by the assignor, on the ground that they are fraudulent as against creditors, rests not in the creditors themselves but in the assignee. *Loos v. Wilkinson*, (1888) 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; *McNancy v. Hall*, (1895) 86 Hun 415, 33 N. Y. S. 518, affirmed without opinion (1899) 130 N. Y. 544, 54 N. E. 1093. See also *Crouse v. Frothingham*, (1884) 97 N. Y. 105, reversing 27 Hun 123; *Spring v. Short*, (1882) 90 N. Y. 538.

Assignee in bankruptcy.—The provisions of this section which authorize an assignee or other trustee of an estate of an insolvent, for the benefit of creditors and others interested, to disaffirm and treat as void all transfers in fraud of their rights, and to maintain all necessary actions for that purpose, dispense with the necessity of any special or other lien in behalf of individual creditors. An action by such a trustee to annul a fraudulent transfer and to recover the property or its avails may be brought for the benefit of simple contract creditors, and an assignee in bankruptcy may maintain such an action. *Southard v. Benner*, (1878) 72 N. Y. 424; *Cole v. Manson*, (1903) 42 Misc. 149, 85 N. Y. S. 1011.

Action by cestui que trust.—A suit to annul a fraudulent conveyance of trust property and to follow the same or its proceeds may be maintained, without authority of any statute, by the cestui que trust against an executor or any trustee of an express trust and his fraudulent grantee or vendee. Such action does not lie merely because the cestui que trust may require the executor to account on his judicial accounting for the full value of the property, notwithstanding the fraudulent sale, and the section has no application to an action brought by a cestui que trust against the trustee and his grantee. *Agne v. Schwab*, (1908) 123 App. Div. 746, 108 N. Y. S. 487. See, however, *Magoun v. Quigley*, (1906) 115 App. Div. 226, 100 N. Y. S. 1037, appeal dismissed (1908) 191 N. Y. 503, 84 N. E. 1116.

Establishment of claim.—"For the purposes of the establishment of the claim or demand, the statute has not given the creditor any greater rights than a judgment creditor would possess. The effect is simply that judgment upon the claim need not be first recovered, but the existence of the claim is to be tested by no more favorable standard than would obtain in an action brought to establish it in the first instance. The debt in suit is a common-law demand, or nothing, and the fact that the ultimate relief under the statute

is to be administered in a proper case by a court of equity, does not affect the manner in which the claim must be established." *Mertens v. Mertens*, (1905) 48 Misc. 235, 96 N. Y. S. 755, affirmed without opinion 113 App. Div. 905, 99 N. Y. S. 1142.

Burden of proof.—The person assailing the conveyance assumes the burden of showing that it was executed in bad faith and left the grantor insolvent and without ample property to pay his existing debts and liabilities. *Kain v. Larkin*, (1892) 131 N. Y. 300, 30 N. E. 105.

Cited.—This section was cited in *Ga Nun v. Palmer*, (1916) 216 N. Y. 603, 111 N. E. 223, modifying 159 App. Div. 86, 144 N. Y. S. 457; *Wile v. Cauffman*, (1899) 39 App. Div. 206, 57 N. Y. S. 240.

§ 269. When remainderman may pay interest owed by life tenant. Whenever real property held by any person for life is incumbered by mortgage or other lien, the interest on which should be paid by the life tenant, and such life tenant neglects or refuses to pay such interest, the remainderman may pay such interest, and recover the amount thereof, together with interest thereon from the time of such payment, of the life tenant.

This section was derived from Real Property Law of 1896, § 233.

Section 269 of the Real Property Law of 1896 is now covered by section 320.

Action for partition by remainderman: see Code Civ. Pro., § 1533.

Liability of life tenant generally.—Generally, the estate of a life tenant must bear the burden of taxes, ordinary repairs, and the payment of interest upon liens if any exist. *Wilcox v. Quinby*, (1893) 73 Hun 524, 26 N. Y. S. 114; *Sage v. Gloversville*, (1899) 43 App. Div. 245, 60 N. Y. S. 791. See also *Matter of Wagner*, (1909) 132 App. Div. 306, 117 N. Y. S. 53. But where the intention of a testator was that the general estate should bear the burden of the expenses connected with the maintenance of a life estate, and that in no event, save a rental by the widow, should her life estate be charged with taxes, it was held that it was the duty of the remainderman to pay the same. *Clarke v. Clarke*, (1895) 145 N. Y. 476, 40 N. E. 220.

Charges for carrying unproductive property.—The charges for carrying unimproved and unproductive property withheld by testamentary trustees from the market for the eventual benefit of the remainder, where the trustees have acted in the exercise of a sound discretion and the property has appreciated in value sufficiently to justify their management, should be charged upon the fund and not upon the income of the life tenant. *Matter of Coombs*, (1909) 62 Misc. 597, 116 N. Y. S. 1129.

Savings of life tenant.—Where a life tenant is entitled to the income from an estate in remainder, and saves each year a part thereof, such savings belong to him absolutely and become his personal property. *Matter of Cutler*, (1898) 23 Misc. 508, 52 N. Y. S. 842; *Shangle v. Hallock*, (1896) 6 App. Div. 55, 39 N. Y. S. 619; *Hendricks v. Hendricks*, (1896) 3 App. Div. 604, 38 N. Y. S. 402, affirmed without opinion (1897) 154 N. Y. 751, 49 N. E. 1098.

§ 270. Powers of courts of equity not abridged. Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

This section was derived from Real Property Law of 1896, § 234.

Section 270 of the Real Property Law of 1896 is now covered by section 321.

When written conveyance necessary: see supra, § 242.

When contract to lease or sell void: see supra, § 259.

Jurisdiction of Supreme Court.—The Supreme Court, in an action in equity within its general power, must determine whether it will assert its jurisdiction, and the parties to an action are bound by the judgment rendered, even

if the determination is contrary to the generally accepted rules of equity jurisprudence, unless the same is reversed or set aside upon appeal or by some other direct attack. *Tonnelle v. Wetmore*, (1909) 195 N. Y. 436, 88 N. E. 1068, reversing 124 App. Div. 686, 109 N. Y. S. 349. See also *Dunckel v. Dunckel*, (1894) 141 N. Y. 427, 36 N. E. 405. In *Wood v. Rabe*, (1884) 96 N. Y. 414, 48 Am. Rep. 640, the court said: "There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. . . . One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." See also *Mackall v. Olcott*, (1904) 93 App. Div. 282, 87 N. Y. S. 757, affirmed without opinion (1906) 183 N. Y. 580, 76 N. E. 1100; *Robbins v. Robbins*, (1882) 89 N. Y. 251, reversing 47 Super. Ct. 193; *McCartney v. Titsworth*, (1907) 119 App. Div. 547, 104 N. Y. S. 45.

Basis of doctrine of part performance.—The doctrine of part performance is based upon the principle that it would be inequitable, and a fraud on the part of the individual insisting upon the statute, to rely upon it after having, by his acts, induced his adversary to do acts in part performance of a parol agreement and upon the faith of its full performance by both parties, and for which he cannot well be compensated in any manner except by a specific performance of the agreement. Hence the acts of part performance which are to estop a party from insisting upon it, must be on the part of the person asking a performance, and not of the person insisting upon the statute. For if the latter chooses to waive the benefit of his acts of part performance his adversary has no claim for relief founded upon them. *Rathbun v. Rathbun*, (1849) 6 Barb. 98. The doctrine of equity, recognized by the statute, which grants specific performance of an oral contract within the statute of frauds, which has been partly performed, is based upon the ground that otherwise one party would be enabled to practice a fraud upon the other. So, where land was purchased by one in his own name, under an oral agreement with another to purchase it for and convey it to the latter on receipt of the amount paid therefor, the facts that the promisee performed on his part by paying the purchaser the amount paid by him, that such payment was accepted, and that he made repairs, and paid taxes, insurance, and interest on mortgages on the premises, on the faith of the agreement, were held to entitle the promisee to a specific performance of the contract to convey, without regard to what interest, if any, he had in the land before the purchase. *Canda v. Totten*, (1898) 157 N. Y. 281, 51 N. E. 989, reversing 87 Hun 72, 33 N. Y. S. 962. See also *Freeman v. Freeman*, (1870) 43 N. Y. 34, 3 Am. Rep. 657, affirming 51 Barb. 306; *Ryan v. Dox*, (1866) 34 N. Y. 307, 90 Am. Dec. 696, reversing 25 Barb. 410; *Messiah Home for Children v. Rogers*, (1914) 161 App. Div. 366, 146 N. Y. S. 711, affirmed (1914) 212 N. Y. 315; *Veeder v. Horstmann*, (1903) 85 App. Div. 154, 83 N. Y. S. 99; *Dunckel v. Dunckel*, (1890) 56 Hun 25, 8 N. Y. S. 888.

An oral contract that whenever specified real property should be sold the vendor would pay to a real estate agent \$5,000 in full payment for services theretofore and which thereafter should be rendered, and, in case the property should be disposed of for cash, payment was to be made in cash, but if for land then such agent "should be entitled therein at the same time to such a portion thereof as five thousand dollars (\$5,000) should bear to its value," although a contract for the rendition of services, is equally a contract for the sale of land or an interest in land; and where the property is subsequently exchanged for other real estate the rendition of the services called for by the contract is not such a part performance thereof under the statute of frauds as would authorize a court of equity to decree a specific performance of its provisions, since the value of the services rendered may be recovered in an action at law. *Russell v. Briggs*, (1901) 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556, reversing 12 App. Div. 624, 44 N. Y. S. 1128. The part performance must be such that the party will be put into a situation which is a fraud upon him unless the agreement is fully performed. *Wheeler v. Reynolds*, (1876) 66 N. Y. 227; *Kineaid v. Kineaid*, (1895) 85 Hun 141, 32 N. Y. S. 476, affirmed without opinion (1899) 157 N. Y. 715, 53 N. E. 1126.

Enforcement of vague agreement.—Equity will not, under any circumstances, compel the performance of a parol agreement, vague in its terms and

standing upon the uncertain testimony of a witness. *Dunkel v. Dunkel*, (1894) 141 N. Y. 427, 36 N. E. 405; *Crouse v. Frothingham*, (1884) 97 N. Y. 105, reversing 27 Hun 123; *Gouge v. Gouge*, (1898) 26 App. Div. 154, 49 N. Y. S. 879. Nor can a contract be specifically enforced unless it states fully all the terms and subject matter to be affected. If any of these are omitted and resort must be had for exemplification to parol evidence, it cannot be sustained. *Wright v. Weeks*, (1862) 25 N. Y. 153, affirming 3 Bosw. 372; *Ladd v. Stevenson*, (1887) 43 Hun 541, 6 N. Y. St. Rep. 652, affirmed (1889) 112 N. Y. 325, 19 N. E. 842, 8 A. S. R. 748.

Antenuptial contracts.—It has been the constant practice of the courts to enforce antenuptial contracts according to their terms, but such enforced contracts have invariably been written contracts the existence of which could not be open to question, and the court will scrutinize even such written contracts very closely, and will prevent their being made the instruments of oppression, deception or fraud. *Lamb v. Lamb*, (1897) 18 App. Div. 250, 46 N. Y. S. 219. See also *De Pierres v. Thorn*, (1859) 4 Bosw. 266.

Application of statute of frauds.—The rule laid down by the section forms a qualification of the statute of frauds. *Bauman v. Holzhausen*, (1882) 26 Hun 505. See also *Richmond v. Foote*, (1870) 3 Lans. 244; *Wood v. Mulock*, (1882) 48 Super. Ct. 70. It is not necessary that transactions or agreements as to lands should be in writing in order to take them out of the operation of the statute of frauds, so far as concerns the power of equity to enforce them, because they may be completely executed by at least one of the parties so as to be no longer executory, and because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements. *Sprague v. Cochran*, (1894) 144 N. Y. 104, 38 N. E. 1000, reversing 70 Hun 512, 24 N. Y. S. 369. But it is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land, in the sense of courts of equity, to free it from the operation of the statute of frauds. The general rule is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed, and the principle upon which courts of equity hold that part performance is sufficient is that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it is not in writing. *Miller v. Ball*, (1876) 64 N. Y. 286.

In *Murphy v. Whitney*, (1894) 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123, affirming 69 Hun 573, 23 N. Y. S. 1134, there was a verbal agreement under which the plaintiff claimed a remainder in certain real estate, and in pursuance of which the defendant had become vested with the title, but was undertaking to dispose of it in violation of the agreement. In answer to the defense of the statute of frauds it was said: "But here there was part performance sufficient to take the agreement out of the statute of frauds. The agreement alleged in the complaint has been substantially kept by all the parties thereto until the land became vested in the defendant . . . and she had thus been largely benefited by the agreement, and had received all the fruits thereof which were to come to her. She could not, therefore, urge against this agreement that it was void under the statute of frauds, because not in writing."

In *Smith v. Smith*, (1891) 125 N. Y. 224, 26 N. E. 259, affirming 51 Hun 164, 4 N. Y. S. 669, it was held that a parol agreement to give a lien upon land to be expended in improving it, followed by an advancement and actual expenditure of the money in the manner contemplated, was so far performed that equity would enforce it, and that the statute of frauds was no defense to an action brought for that purpose.

In *Ryan v. Dox*, (1866) 34 N. Y. 207, 90 Am. Dec. 696, reversing 25 Barb. 440, it was said: "Where one of the parties to a contract, void by the statute of frauds, avails himself of its invalidity, but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim that the opposite party may happen to secure the same practical benefit, through the process of restitution, which would have resulted from the observance of the void agreement."

Where the day after an unsigned lease was given to the defendant he paid a deposit and received a receipt reciting a five-year lease, and entered into

possession and made permanent improvements, the grantee of the premises under a deed reciting the lease was held to take title subject to all equities, and could not maintain summary proceedings to dispossess the defendant on a claim that there could be no such lease as it was not in writing signed by the party to be bound thereby. *Roedmann v. Hertel*, (1912) 78 Misc. 55, 138 N. Y. S. 375.

Where the vendee, induced by fraudulent representations, accepts a conveyance, not including all the lands orally agreed to be conveyed, and pays the consideration and enters into possession, the statute of frauds is not a bar to an action to compel a specific performance of the oral agreement; and, although no improvements have been made by him upon the lands not included in the deed, he is not confined to relief in damages, but may have specific performance. *Beardsley v. Duntley*, (1877) 69 N. Y. 577.

Construction with section 94.—Section 94, *supra*, must be read under the limitations imposed by this section. *Quinn v. Quinn*, (1902) 69 App. Div. 598, 75 N. Y. S. 83.

§ 271. Construction of covenants in mortgages on leases of real property and bonds. In mortgages on leases of real property and in bonds secured thereby, the following or similar covenants or agreements must be construed as follows:

1. In default of payment, mortgagee to have power to sell.—A covenant that the mortgagor “will pay the indebtedness, as provided in the mortgage, and if default be made in the payment of any part thereof, the mortgagee or obligee shall have power to sell the premises therein described, according to law,” must be construed as meaning that the mortgagor or obligor shall well and truly pay unto the mortgagee or obligee the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, according to the condition of the said bond or obligation. And if default shall be made in the payment of the said sum of money therein mentioned, or in the interest which shall accrue thereon, or of any part of either, that then and from thenceforth it shall be lawful for the said mortgagee or obligee, his legal representative or assigns, to sell, transfer and set over, all the rest, residue and remainder of the said term of years then yet to come, and all other, the right, title and interest of the said mortgagor or obligor of, in and to the same, at public auction, according to the act in such case made and provided. And as the attorney of the said mortgagor or obligor for that purpose by these presents duly authorized, constituted and appointed, to make, seal, execute and deliver to the purchaser or purchasers thereof, a good and sufficient assignment, transfer or other conveyance in the law, for the said premises, with the appurtenances; and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase-money (if any there shall be) unto the said mortgagor or obligor, his legal representatives or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said mortgagor

or obligor, and against all persons claiming or to claim the premises or any part thereof, by, from or under him or them, or any of them.

2. Mortgagor to keep buildings insured.—A covenant “that the mortgagor will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee,” must be construed as meaning that the said mortgagor or obligor shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss and damage by fire, by insurance, and in an amount approved by the said mortgagee or obligee and his assigns, and either assign the policy and certificates thereof or have such insurance made payable to the said mortgagee or obligee or his assigns, and in default thereof it shall be lawful for the said mortgagee or obligee and his assigns to effect such insurance, and the premium and permiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand, with legal interest.

3. Mortgagor to pay rent and charges on premises.—A covenant that the mortgagor “will pay the rent and other charges mentioned in and made payable by said indenture of lease within days after said rent or charges are payable,” must be construed as meaning that the said mortgagor or obligor and his legal representatives and assigns, will pay or cause to be paid, and discharge all rent and rents mentioned in and made payable by the indenture of lease aforesaid, and also all taxes, assessments or other charges that now are a lien, or hereafter shall or may be levied, assessed or imposed and become a lien upon the premises above described or any part thereof; and in default thereof, for the space of after such taxes or assessments or after the said rent or rents, or any of them shall have become due and payable by the terms of said lease or by law, then and in each and every such case the said mortgagee or obligee, his legal representatives or assigns may, at option, and without notice, pay such rent or rents, taxes, assessments or other charges and expenses, and the amount so paid, and interest thereon, from the time of such payment, shall forthwith be due and payable from the said mortgagor or obligor, his legal representatives or assigns, to the said mortgagee or obligee, his legal representatives or assigns, and shall be deemed to be secured by these presents, and shall be collectable in the same manner, and at the same time, and upon the same conditions as the interest then next maturing upon the principal sum hereinbefore mentioned.

4. Agreement that whole sum shall become due.—The words “And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee

or obligee after default in the payment of any instalment of principal or after default in the payment of interest for days, or after default in the payment of any rent or other charge made payable by said indenture of lease for days, or after default in the payment of any tax or assessment for days after notice and demand," must be construed as meaning that should any default be made in the payment of any instalment of principal or any part thereof, or of said interest or any part thereof, or of any rent or other charge made payable by said indenture or lease, on any day whereon the same is made payable, or should any tax or assessment, which now is or may be hereafter imposed upon the premises hereinafter described, become due and payable, and should the said interest, rent or other charge aforesaid, remain unpaid and in arrear for the space of days, or such tax or assessment remain unpaid and in arrear for days after written notice by the mortgagee or obligee, his executors, administrators or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, rent and other charges paid by the mortgagee or obligee, shall, at the option of the said mortgagee or obligee, his executors, administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding.

This section was derived from Real Property Law of 1896, § 235, as added by L. 1898, ch. 338.

Section 271 of the Real Property Law of 1896 is now covered by section 324.

Construction of covenants in mortgages and bonds: see *supra*, § 254.

Mortgage clauses: see INSURANCE LAW, § 121 and note.

Covenant adding premiums to debt.—A covenant adding insurance premiums paid by the mortgagee to the obligation is no more than a recital of a right recognized under subdivision 2 of the section. *Op. Atty.-Gen.* (1913) 131.

Right of mortgagee to insure.—Where a mortgage provides that the mortgagor shall keep the buildings insured against loss by fire for the benefit of the mortgagee, the only right of the mortgagee upon default of the mortgagor in effecting the insurance is to make such insurance "from year to year;" and on the purchase of certain mortgaged premises by the defendant, who procured insurance thereon and tendered the policy to the mortgagee, it was held that the mortgagee, who before the purchase by the defendant, had procured insurance on the property for three years, could not refuse to accept the defendant's policy, demand that he repay the premium on the three-year policy, and upon his default in so doing refuse to accept the payments of principal and interest tendered as provided in the mortgage, and maintain an action to foreclose the same, electing to demand payment of the entire sum secured by the mortgage. *Bieber v. Goldberg*, (1909) 133 App. Div. 207, 117 N. Y. S. 211.

Right of mortgagee to designate insurance company.—Where a mortgagor covenants to keep buildings insured for the benefit of the mortgagee, the latter has a right to require the insurance to be procured in such company as he may direct; but where the mortgagee's attorney approves the policies

offered and they are accepted and a loan is made, such right is waived and the mortgagee cannot thereafter procure additional insurance at the mortgagor's expense, in the absence of any sufficient cause. *Heal v. Richmond County Sav. Bank*, (1908) 127 App. Div. 428, 111 N. Y. S. 602, affirmed without opinion (1909) 196 N. Y. 549, 89 N. E. 1101.

Construction with section 254.—In *Bieber v. Goldberg*, (1909) 133 App. Div. 207, 117 N. Y. S. 211, it was held that this section relates to mortgages on leases only, and does not supersede subdivision 3 of section 254, *supra*, providing that for a failure to pay a premium of insurance or assign to the mortgagee a satisfactory policy, he shall have the right to demand payment of the principal sum. It was further declared that the expression of the court to the contrary in *Heal v. Richmond County Sav. Bank*, (1908) 127 App. Div. 428, 111 N. Y. S. 602, affirmed without opinion (1909) 196 N. Y. 549, 89 N. E. 1101, was dictum.

Effect of mortgage without covenant of seizin or warranty upon after-acquired title.—A mortgage containing no covenants of seizin or warranty, executed and recorded before the mortgagor had acquired title to the premises described therein, has no greater effect than a quitclaim deed, and is not enforceable against the premises in the hands of a person who purchased them for value from the mortgagor's heir at law without actual notice of the existence of the mortgage. *Donovan v. Twist*, (1905) 105 App. Div. 171, 93 N. Y. S. 990, same case on former appeal 85 App. Div. 130, 83 N. Y. S. 76. See also *Jackson v. Littell*, (1874) 56 N. Y. 108; *Hirth v. Zeller*, (1905) 108 App. Div. 198, 95 N. Y. S. 747.

Deeds absolute in form as mortgages.—Where deeds, although absolute in form, are in fact mortgages, the relation between the parties thereto is that of mortgagor and mortgagee, and the fact once established, either by the terms of the conveyance or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees; and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor or those claiming under him until after foreclosure. *Mooney v. Byrne*, (1900) 163 N. Y. 86, 57 N. E. 163, reversing 15 App. Div. 624, 44 N. Y. S. 1124; *Faulkner v. Cody*, (1904) 45 Misc. 64, 91 N. Y. S. 633. See also *Conover v. Palmer*, (1908) 123 App. Div. 817, 108 N. Y. S. 480.

Rights of mortgagee in possession.—A mortgagee holds simply a chose in action secured by a lien upon the land, and cannot become a mortgagee in possession unless the entry is with either the implied or express consent of the owner of the equity; such entry is not in hostility to the legal title and hence not adverse. The owner of the equity cannot maintain ejectment against a mortgagee in possession but must resort to an action in equity to redeem. *Becker v. McCrea*, (1908) 193 N. Y. 423, 86 N. E. 463, 23 L. R. A. (N. S.) 754, reversing 119 App. Div. 56, 103 N. Y. S. 963.

§ 272. Construction of grant of appurtenances, and all of the rights and estate of the mortgagor. In any mortgage on a lease of real property the words "together with the appurtenances and all the estate and rights of the part of the first part of, in and to said premises under and by virtue of the aforesaid indenture of lease," must be construed as meaning, together with all and singular the edifices, buildings, rights, members, privileges and appurtenances thereunto belonging or in anywise appertaining; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity, of the said mortgagor or obligor, of, in and to the said demised premises, and every part and parcel thereof, with the appurtenances; and also the said

indenture of lease, and the renewal therein provided for, and every clause, article and condition therein expressed and contained.

This section was derived from Real Property Law of 1896, § 236, as added by L. 1898, ch. 338.

Section 272 of the Real Property Law of 1896 is now covered by section 325.

Construction of covenants in mortgages and bonds: see supra, § 254.

Covenants bind representatives of mortgagor and inure to benefit of whom: see supra, § 257.

§ 273. What form of mortgage on lease of real property. The use of the following form of instrument for mortgages on leases of real property is lawful, but this section does not prevent or invalidate the use of other forms.

SCHEDULE D

MORTGAGE ON LEASE OF REAL PROPERTY

This indenture, made the day of, in the year one thousand hundred and, between of (insert residence) of the first part and of (insert residence) of the second part; whereas did, by a certain indenture of lease, bearing date the day of, in the year one thousand nine hundred and, demise, lease and to farm let unto and to executors, administrators and assigns, all and singular the premises herein after mentioned and described, together with their appurtenances; to have and to hold the same unto the said and to executors, administrators and assigns, for and during and until the full end and term of years, from the day of, one thousand nine hundred and, fully to be complete and ended, yielding and paying therefor unto the said and to or assigns, the yearly rent or sum of

And whereas, the said part.... of the first part justly indebted to the said part... of the second part, in the sum of lawful money of the United States of America, secured to be paid by certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of on the day of, nineteen hundred and and the interest thereon to be computed from at the rate of per centum per annum and to be paid

It being thereby expressly agreed that the whole of the said principal sum shall become due at the option of the mortgagee or obligee after default in the payment of interest, taxes or assessments or rents as hereinafter provided.

Now this indenture witnesseth that the said part... of the first part, for the better securing the payment of the said sum of

money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of the sum of one dollar, paid by the said part... of the second part, the receipt whereof is hereby acknowledged, doth grant and release, assign, transfer and set over unto said part... of the second part, and to his heirs (or successors) and assigns forever.

(Description.)

Together with the appurtenances and all the estate and rights of the part... of the first part of, in and to said premises under and by virtue of the aforesaid indenture of lease.

To have and hold the said indenture of lease and renewal, and the above granted premises, unto the said part... of the second part, his heirs and assigns, for and during all the rest, residue and remainder of the said term of years yet to come and unexpired, in said indenture of lease and in the renewals therein provided for; subject, nevertheless, to the rents, covenants, conditions and provisions in the said indenture of lease mentioned.

Provided always that if the said part... of the first part shall pay unto the said part... of the second part, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents and the estate hereby granted, shall cease, determine and be void.

And the said part... of the first part covenant.. with the said part... of the second part as follows:

First. That the part... of the first part will pay the indebtedness as hereinbefore provided.

And if default shall be made in the payment of any part thereof the said part... of the second part shall have power to sell the premises therein described according to law.

Second. That the said premises now are free and clear of all incumbrances whatsoever, and that ha... good right and lawful authority to convey the same in manner and form hereby conveyed.

Third, That the part... of the first part will keep the buildings on the said premises insured against loss by fire, for the benefit of the mortgagee.

Fourth. That the part... of the first part will pay the rents and other charges mentioned in and made payable by said indenture of lease within days after said rent or charges are payable.

Fifth. And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of the said mortgagee or obligee after default in the payment of any instalment of principal, or after default in the payment of interest for days, or after default in the payment of any rent or

other charge made payable by said indenture of lease for days, or after default in the payment of any tax or assessment for days after notice and demand.

In witness whereof, the said part. . . . of the first part to these presents ha. . . hereunto set hand. . and seal. . the day and year first above written.

Scaled and delivered }
in the presence of }

This section was derived from Real Property Law of 1896, § 237, as added by L. 1898, ch. 338.

Section 273 of the Real Property Law of 1896 is now covered by section 326. *Landlord and tenant generally*: see *supra*, § 220 et seq.

Mortgage on leasehold interest.—A lease of real property is a chattel real, and a mortgage thereon is a conveyance which may be recorded. *People v. Gass*, (1907) 120 App. Div. 147, 104 N. Y. S. 885, affirmed without opinion (1908) 190 N. Y. 565, 83 N. E. 1129.

§ 274. Transfers and mortgages of interest in decedents' estate. Every conveyance, assignment, or other transfer of, and every mortgage or other charge upon the interest, or any part thereof, of any person in the estate of a decedent which is situated within this state, shall be in writing, and shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded. Any such instrument may also be recorded as hereinafter provided; and if not so recorded, it is void against any subsequent purchaser or mortgagee of the same interest or any part thereof, in good faith and for a valuable consideration, whose conveyance or mortgage is first duly recorded. If such interest is entirely in the real property of a decedent, the conveyance or mortgage shall be recorded in the office of the clerk of the county where such real property is situated. If such interest is in both the personal and the real property of a decedent the conveyance or mortgage shall be recorded in the office of the surrogate issuing letters testamentary or letters of administration upon the said decedent's estate, or if no such letters have been issued, then in the office of the surrogate having jurisdiction to issue the same, and also in the office of the said county clerk. Such a conveyance or mortgage when so recorded, shall be indexed under the name of the decedent, in a book to be kept for the purpose by each recording officer. The person presenting any such instrument for record shall pay to the clerk of the surrogate's court a fee of ten cents for each folio.

This section was derived from L. 1904, ch. 692, § 1.

Section 274 of the Real Property Law of 1896 is now covered by section 327.

Recording of conveyances: see *infra*, § 291.

Recording books and indexes: see *infra*, §§ 315, 316.

Transfers and mortgages of interests in decedents' estates to be in writing and recorded: see PERSONAL PROPERTY LAW, § 32.

"In good faith." This section invalidates an earlier unrecorded transfer as to subsequent transferees in good faith, that is to say, transferees without

notice of earlier rights and the transfers to whom shall be first duly recorded. Presumptively those claiming under recorded transfers are transferees in good faith as against transfers earlier in time but unrecorded or of later record; and the burden, therefore, is upon him who claims under an unrecorded transfer, or one of later record, in hostility to one later in time but first recorded, to show that the latter was taken with notice on the part of the transferee thereunder of the earlier one. *Lask v. Hoagland*, (1909) 64 Misc. 156, 118 N. Y. S. 1035, reversed on other grounds 136 App. Div. 658, 121 N. Y. S. 197. See also *Brown v. Volkening*, (1876) 64 N. Y. 76; *Tyler v. Strang*, (1855) 21 Barb. 198.

Consideration.—A court of equity will not, in the absence of fraud or undue influence, interfere to set aside a sale by a legatee of a legacy of a fixed and certain sum of money, payable at a fixed period after the death of the testator with interest, although the sale was made some years before the legacy was due and for an inadequate consideration, and although the legatee was at the time of the sale a “reckless, dissipated, improvident, and weak-minded young man.” Such a sale is not within the equity rule which enables the court to relieve expectant heirs, remaindermen, and reversioners, from disadvantageous bargains, where both the amount or value of the interest sold and the time of its enjoyment are uncertain. Mere inadequacy of price is not a sufficient ground for avoiding a sale, unless the inadequacy is so gross as to afford presumptive evidence of actual fraud or is coupled in fact with fraud, surprise, ignorance, mistake, delusion, or imbecility. *Parmelee v. Cameron*, (1869) 41 N. Y. 392.

Cited.—This section was cited in *Matter of Losee*, (1907) 119 App. Div. 107, 104 N. Y. S. 1132, 46 Misc. 363, 94 N. Y. S. 1082.

§ 275. Assignment of mortgage required in lieu of certificate of discharge. Whenever a mortgage upon real property shall be due and payable the mortgagee or the owner and holder of the mortgage shall execute and deliver to any person or persons, or corporation, named by the owner of the land upon which the same is a lien, an assignment of the mortgage duly executed which may by its terms be without recourse to the assignor in any event and discharge such assignor from any liability thereunder to the assignee; provided a demand has been made of the holder of the mortgage by the owner of the land upon which the same is a lien for such assignment in lieu of a certificate of discharge of the same, and the full amount of principal and interest due on the mortgage and the usual fee for drawing the assignment is tendered or paid. But nothing in this section contained shall require such execution and delivery of an assignment of the mortgage in lieu of a certificate of discharge where the owner and holder of the mortgage so due and payable also holds or has a junior or subsequent mortgage or other lien on the same property.

New. Added by L. 1914, ch. 408. It was amended by L. 1915, ch. 493, by which the last sentence was added.

Section 275 of the Real Property Law of 1896 is now covered by section 328.

Another section 275 was added by L. 1916, ch. 313. See section 275, *infra*.

Recording discharge of mortgage: see *infra*, § 321.

Effect of recording assignment of mortgage: see *infra*, § 324.

§ 275. Apportionment of rents, annuities, dividends and other payments. All rents reserved on any lease and all annuities, dividends and other payments of every description made payable or

becoming due at fixed periods under any instrument shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination or transfer by any other means of the interest of any such person, he or his executors, administrators or assigns, and the person who thereupon becomes entitled to such rents, annuities, dividends or other payments or the estate or fund from or in respect of which the same issues or is derived, shall each be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof to the time of such determination or transfer as the case may be, including the day of such death or of such determination or transfer, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. If any such payment become due or be collected after such determination or transfer every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form part, must be collected and recovered by the person or persons who, but for this section, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. If any such payment shall have been collected before such determination or transfer, then the amount apportionable as herein provided shall be paid or allowed immediately, to the person entitled thereto, and may be recovered from the person who shall have collected the same. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description or under annuity contracts issued by life insurance companies.

Sew. Added by L. 1916, ch. 313.

Another section 275 was added by L. 1914, ch. 408. See section 275, *supra*.

ARTICLE 9

RECORDING INSTRUMENTS AFFECTING REAL PROPERTY

- Section 290. Definitions; effect of article.
291. Recording of conveyance.
292. By whom conveyance must be acknowledged or proved.
293. Recording of conveyances heretofore acknowledged or proved.
294. Recording executory contracts and powers of attorney.
295. Recording of letters patent.
296. Recording copies of instruments which are in secretary of state's office.
297. Certified copies may be recorded.
298. Acknowledgments and proofs within the state.
299. Acknowledgments and proofs in other states.
300. Acknowledgments and proofs in Porto Rico, the Philippines, Cuba, and elsewhere.
301. Acknowledgments and proofs in foreign countries.
302. Acknowledgments and proofs by married women.
303. Requisites of acknowledgments.
304. Proofs by subscribing witness.
305. Compelling witnesses to testify.
306. Certificate of acknowledgment or proof.
307. When certificate to state time and place.
308. When certificate must be under seal.
309. Acknowledgment by corporation and form of certificate.
310. [When county clerk's authentication necessary.]
311. When other authentication necessary.
312. Contents of certificate of authentication.
313. Recording of conveyances acknowledged or proved without the state, when parties and certifying officer are dead.
314. Proof when witnesses are dead.
315. Recording books.
316. Indexes.
317. Order of recording.
318. Certificate to be recorded.
319. Time of recording.
320. Certain deeds deemed mortgages.
321. Recording discharge of mortgage.

- Section 322. Recording discharge of mortgage in counties embraced in cities of first class.
323. Recording discharge of mortgage in counties embraced in cities of first class where property lies in more than one of such counties.
324. Effect of recording assignment of mortgage.
325. Recording of conveyances made by treasurer of Connecticut.
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329. Actions to have certain instruments canceled of record.
330. Officers guilty of malfeasance liable for damages.
331. Laws and decrees of foreign countries appointing agents and attorneys and recording of the same.
332. The record of certain conveyances validated.
- *333. When conveyances of real property not to be recorded.
- †333. [Discharge of mortgage.]
334. Maps to be filed; penalty for nonfiling.

§ 290. Definitions; effect of article. 1. The term "real property," as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years.

2. The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate.

3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

4. The term "recording officer" means the county clerk of the county, except in the counties of New York, Kings or Westchester, where it means the register of the county.

5. This article does not apply to leases for life or lives, or for years, heretofore made, of lands in either of the counties of

*Added by L. 1910, ch. 227.

†Added by L. 1911, ch. 574.

Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware or Schenectady.

This section was derived from Real Property Law of 1896, § 240, as amended by L. 1905, ch. 449, § 1.

Section 290 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 90.

Instruments entitled to be recorded and purchasers protected: see *infra*, § 291, note.

Terms "real property" and "lands" as used in first eight articles of chapter: see *supra*, § 2.

Term "real property" generally: see GENERAL CONSTRUCTION LAW, § 40.

"Real property" as used in Lien Law: see LIEN LAW, § 2.

"Real property" as affecting descent and distribution: see DECEDENT ESTATE LAW, § 80, subd. 1.

"Real property" as used in Tax Law: see TAX LAW, § 2, subd. 3; § 250.

"Real property" as used in Condemnation Law: see Code Civ. Pro., § 33:8.

"Real property" as used in Surrogates' Courts Act: see Code Civ. Pro., § 2768, subd. 13.

§ 291. Recording of conveyances. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

This section was derived from Real Property Law of 1896, § 241, with L. 1896, ch. 572, § 2 pt. incorporated.

Section 291 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 92.

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I. GENERALLY

Register of county generally: see GENERAL CONSTRUCTION LAW, § 42.

Register of county as recording officer: see GENERAL CONSTRUCTION LAW, § 42.

Order and time of recording: see *infra*, §§ 317, 319.

Indexes: see *infra*, § 316.

Sufficiency of record where statute does not prescribe particular book for recordation: see 7 Ann. Cas. 356 note,

Effect of change in county or district boundaries after recordation: see 18 Ann. Cas. 158 note.

Construction notice from record of instrument with defective description of property: see notes, Ann. Ann. Cas. 1917B 785; L. R. A. 1916A 530.

Liability of attorney to client for failure to record instrument: see Ann. Cas. 1917B 22 note.

Record of instrument as constructive notice of fraud: see Ann. Cas. 1917A 267 note.

Accuracy as to Christian name or initials as affecting notice: see L. R. A. 1915D 1211 note.

Conveyance recorded before grantor obtains title: see 23 L. R. A. 561 note.

Effect of quitclaim deed in otherwise perfect record title: see 29 L. R. A. 33 note.

First recording act.—The earliest recording act in relation to deeds of lands in the city of New York was passed in 1810 (L. 1810, ch. 175), and the legislature passed the general recording act in 1813 (Revised Laws of 1813, ch. 97). *Felix v. Devlin*, (1904) 90 App. Div. 103, 86 N. Y. S. 12, affirmed on resubmission 91 App. Div. 613, 88 N. Y. S. 1101.

For a legislative and judicial history of section 291 of the so-called recording acts, see *Hatcher v. Brunt*, (1915) 89 Misc. 530, 153 N. Y. S. 707.

Purpose of section.—The recording acts were designed to protect persons dealing with certain conveyances and instruments, and to prevent deceit and fraud; and it is the duty of courts to place such a construction upon those statutes as will accomplish the purpose for which they were designed. *People v. Luhrs*, (1909) 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473, affirming 127 App. Div. 634, 111 N. Y. S. 749; *Weideman v. Zielinska*, (1905) 102 App. Div. 163, 92 N. Y. S. 493; *Raynor v. Wilson*, (1844) 6 Hill 469; *Larned v. Donovan*, (1895) 84 Hun 533, 32 N. Y. S. 731, affirmed (1898) 155 N. Y. 341, 49 N. E. 942; *Rourke v. Murphy*, (1883) 12 Abb. N. Cas. 402. The main object was to prevent persons having title to land from selling it more than once and thereby defrauding one or more of the purchasers. "The object of recording is to give notice to all the world that the title has passed from the vendor to the vendee." *Jackson v. Post*, (1836) 15 Wend. 588. See also *Borebeck v. Roe*, (1867) 50 Barb. 302; *Darragh v. Rowe*, (1905) 109 App. Div. 560, 96 N. Y. S. 666; *Mueller v. Goerlitz*, (1907) 53 Misc. 53, 103 N. Y. S. 1037. And the benefit of the recording of a deed is that it thus becomes a defense against a subsequent bona fide purchaser. *Fryer v. Rockefeller*, (1875) 63 N. Y. 268, affirming 4 Hun 800.

Retroactive effect of statute.—In *Felix v. Devlin*, (1904) 90 App. Div. 103, 86 N. Y. S. 12, affirmed on resubmission 91 App. Div. 613, 88 N. Y. S. 1101, the question was presented whether or not the legislature had the power to declare deeds or grants, good when made and which were not then required to be recorded, void as to subsequent purchasers if not recorded pursuant to some later provisions of law. It was held that the legislature had not the power to render invalid a deed which was good when there was no recording act, or by subsequent legislation to render such a deed void as to subsequent purchasers unless recorded. See to the same effect *Varick v. Briggs*, (1839) 22 Wend. 543; *Hall v. Conklin*, (1910) 138 App. Div. 450, 122 N. Y. S. 967; *Beal v. Miller*, (1874) 1 Hun 390; *Truscott v. King*, (1849) 6 Barb. 346, affirmed (1851) 6 N. Y. 147. And in *Stuyvesant v. Hone*, (1844) 1 Sandf. Ch. 419, affirmed 2 Barb. Ch. 151, the court said: "The effect of recording a conveyance is not retrospective, nor was it designed to change rights already vested and secured by a recorded deed or mortgage. It simply protects a purchaser who takes the precaution to search the records, and record his own conveyance, against prior unrecorded conveyances of which he had no notice. A mortgage is not made more effectual as a lien by being recorded; nor is its record any more notice to subsequent purchasers, than is the docket of a judgment regularly entered, so as to become a lien upon real estate. And there is no reason for holding that the recording of a subsequent mortgage is constructive notice to the holder of a prior valid mortgage, that does not equally apply to make the docketing of a subsequent judgment notice to a prior mortgagee, or elder judgment creditor."

As to the constitutionality of recording acts generally with respect to pre-existing instruments, see 5 Ann. Cas. 258 note.

What constitutes recording.—The record of an instrument is complete when it is left with the clerk for record. *Bedford v. Tupper*, (1883) 30 Hun 174; *Simonson v. Falihee*, (1881) 25 Hun 570.

Indexing as part of record.—The indexing of conveyances or mortgages is no part of the record, and the omission of a county clerk to index a mortgage on the proper book does not deprive the mortgagee of the right of priority given him by the statute. *Mutual Life Ins. Co. v. Dake*, (1881) 87 N. Y. 257. See also *Howells v. Hettrick*, (1897) 13 App. Div. 366, 43 N. Y. S. 183, affirmed (1899) 160 N. Y. 308, 54 N. E. 677.

Record as notice.—The recording acts do not declare what effect, upon the point of notice, shall be given to the recording of conveyances. They declare that unless recorded they shall be void as against subsequent purchasers in good faith and for value, whose conveyances shall be first recorded. But the courts by construction make the record of a conveyance notice to subsequent purchasers, subject to the limitation that it is notice only to those claiming under the same grantor or through one who is the common source of title. *Tarbell v. West*, (1881) 86 N. Y. 280. See also *Cary v. White*, (1873) 52 N. Y. 138, reversing 7 Lans. 1; *Universal Trust Co. v. Boehanski*, (1912) 75 Misc. 317, 135 N. Y. S. 100; *Mueller v. Goerlitz*, (1907) 53 Misc. 53, 103 N. Y. S. 1037; *Tuttle v. Hills*, (1830) 6 Wend. 213, 21 Am. Dec. 306; *Grimstone v. Carter*, (1832) 3 Paige 420. A recorded deed is no notice to an owner in possession who does not claim title through any party to the deed. *Seely v. Seely*, (1914) 164 App. Div. 650, 150 N. Y. S. 66.

Recital as to unrecorded conveyance.—A recital in a recorded instrument as to another unrecorded conveyance is not notice under the recording acts of the unrecorded conveyance. *People's Trust Co. v. Tonkonogy*, (1911) 144 App. Div. 333, 128 N. Y. S. 1055; *Todd v. Eighmie*, (1896) 4 App. Div. 9, 38 N. Y. S. 304.

Covenant running with the land.—A grant creating a covenant on real property duly executed by the owner thereof and duly recorded, is notice to all subsequent purchasers, and the latter are chargeable with notice of the covenant and take the estate subject thereto. *Holt v. Fleischman*, (1902) 75 App. Div. 593, 78 N. Y. S. 647.

Necessity of record of subsequent conveyance.—The recording of the subsequent conveyance is a condition precedent to the benefits given by the statute. *Barber v. Hudson River Telephone Co.*, (1905) 105 App. Div. 154, 93 N. Y. S. 993.

Effect of failure to record prior conveyance.—An unrecorded deed although prior in date has no effect as to a subsequent deed first recorded, and the subsequent deed conveys the title as if the first deed had not been executed. *People v. Waring*, (1879) 76 N. Y. 463.

Cited.—This section was cited in *Irving v. Campbell*, (1890) 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620, reversing 56 Super. Ct. 224; *Moore v. Le Maire*, (1915) 169 App. Div. 154, 154 N. Y. S. 822; *Matter of Kroog*, (1915) 89 Misc. 35, 152 N. Y. S. 553; *Mueller v. Goerlitz*, (1907) 53 Misc. 53, 103 N. Y. S. 1037; *Jefferson v. Bangs*, (1913) 144 N. Y. S. 1054; *Op. Atty.-Gen.* (1911) 28; *Op. Atty.-Gen.* (1911) 651.

II. INSTRUMENTS WITHIN SECTION

When conveyances of real property not to be recorded: see *infra*, § 333.

Recording executory contracts, powers of attorney and revocation: see *infra*, §§ 294, 326.

Recording discharge of mortgage: see *infra*, § 321 et seq.

Recording conveyances made by treasurer of Connecticut: see *infra*, § 325.

Recording of general assignment for benefit of creditors: see *DEBTOR AND CREDITOR LAW*, § 3.

Recording sheriff's certificate of sale on execution: see *Code Civ. Pro.*, § 1439.

Recording certificate of redemption of real property sold under execution: see *Code Civ. Pro.*, § 1470.

Requisites of acknowledgment: see *infra*, § 303.

Meaning of terms "acknowledgment" and "acknowledgment:" see *GENERAL CONSTRUCTION LAW*, § 10.

Meaning of "acknowledged, or proved, and duly certified," as used in Surrogates' Courts Act; see Code Civ. Pro., § 2768, subd. 15.

Recording instrument or conveyance without acknowledgment: see PENAL LAW, § 1862.

Offering false or forged instruments to be recorded: see PENAL LAW, § 2051.

Instrument void on its face: see Ann. Cas. 1912C 675 note.

Assignment of mortgage: 5 L. R. A. 292 note.

Nature of instrument to which section applies.—It is only to an instrument in writing, by which an estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to real estate may be affected in law or equity, that the provisions of the recording statutes have any application, and if the conveyance does not affect any interest in the real estate or the title thereto, in law or equity, no benefit is to be derived from the record. *Bradley v. Walker*, (1893) 138 N. Y. 291, 33 N. E. 1079, reversing 59 Super. Ct. 334, 14 N. Y. S. 315, 39 N. Y. St. Rep. 253; *Gillig v. Maass*, (1863) 28 N. Y. 191. See also *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541; *Mathews v. Damainville*, (1905) 100 App. Div. 311, 91 N. Y. S. 524; *Davidson v. Fox*, (1901) 65 App. Div. 262, 73 N. Y. S. 533. Only such instruments as affect the land and the title to the same are entitled to be recorded, and not such as relate to collateral matters. *Avery v. Empire Woolen Co.*, (1882) 82 N. Y. 582, reversing 23 Hun 509. So, where a contractor placed plumbing in a building under an unrecorded agreement that title to the materials furnished should remain in him until he was fully paid, it was held that a purchaser upon a foreclosure sale of the building had no notice of such agreement and the contractor could not replevy the materials. *McMillan v. Leaman*, (1905) 101 App. Div. 436, 91 N. Y. S. 1055.

Instrument not under seal.—Formerly it was held that a written instrument not under seal was inoperative and ineffectual to pass the legal title to lands. *Morss v. Salisbury*, (1872) 48 N. Y. 636. But see *supra*, § 243 note.

"Of the same real property."—It is only when two conveyances purport to convey the same property that a subsequent purchaser obtains a priority over an earlier grantee by reason of priority of the record of his deed. *Treadwell v. Inslee*, (1890) 120 N. Y. 458, 24 N. E. 651, affirming *Munson v. Reid*, (1887) 46 Hun 399, 11 N. Y. St. Rep. 798. Nor is this section to be taken literally in favor of any subsequent purchaser of the same real estate, without regard to the person of whom the purchase is made. That would lead to absurd consequences, and the section should not receive such an interpretation. It applies to successive purchases of the same real estate from the same seller, and must be limited to cases of that description. *Raynor v. Wilson*, (1844) 6 Hill 469.

Forged instruments.—The fact that a false and fabricated writing is deposited in a public office for record, and is actually recorded, adds nothing to its legal efficacy. The recording act applies to genuine instruments and not to forged ones. *Marden v. Dorthy*, (1899) 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694, affirming 12 App. Div. 188, 42 N. Y. S. 827. See also *Albany County Sav. Bank v. McCarty*, (1896) 149 N. Y. 71, 43 N. E. 427, reversing 71 Hun 227, 24 N. Y. S. 991.

Sheriff's deed in pursuance of execution sale.—A sheriff's deed given in pursuance of a sale under an execution and duly recorded, is protected by and has the benefit of this section. *Hetzel v. Barber*, (1877) 69 N. Y. 1, reversing in part 6 Hun 534; *Beman v. Douglas*, (1896) 1 App. Div. 169, 37 N. Y. S. 859; *Reynolds v. Darling*, (1864) 42 Barb. 418.

Sheriff's certificate of sale.—A sheriff's certificate of sale is not a conveyance within the meaning of the section, as it does not affect any estate or interest in real estate. *Davidson v. Crooks*, (1899) 45 App. Div. 616, 61 N. Y. S. 362. See also *Beman v. Douglas*, (1896) 1 App. Div. 169, 37 N. Y. S. 859.

Bargain and sale deed.—A bargain and sale deed is a conveyance within the meaning of this section. *Wilhelm v. Wilken*, (1896) 149 N. Y. 447, 44 N. E. 82, 52 A. S. R. 743, 32 L. R. A. 370, affirming 75 Hun 552, 27 N. Y. S. 853.

Referee's deed.—A referee's deed is a conveyance within the terms of this section. *Slattery v. Schwannecke*, (1887) 44 Hun 75, 7 N. Y. St. Rep. 430, affirmed (1890) 118 N. Y. 543, 23 N. E. 922.

Quitclaim deed.—A grantee, without notice of a prior conveyance and for a valuable consideration of real estate by a deed which releases and quitclaims a certain particularly described property, with all the appurtenances and all the estate, right, title and interest of the grantor, with habendum to the grantee, his heirs and assigns, forever, is to be deemed a bona fide purchaser for value without notice, and as such is entitled to the protection accorded by this section against a previously executed and delivered but subsequently recorded conveyance. *Wilhelm v. Wilken*, (1896) 149 N. Y. 447, 44 N. E. 82, 52 A. S. R. 743, 32 L. R. A. 370, affirming 75 Hun 552, 27 N. Y. S. 853.

Estates for years.—Estates for years are chattels real, and, except a lease for a term not exceeding three years, can be recorded. *People v. State Board of Tax Comr's*, (1912) 153 App. Div. 532, 138 N. Y. S. 344; *Westchester Trust Co. v. Hobby Bottling Co.*, (1905) 102 App. Div. 464, 92 N. Y. S. 482, affirmed without opinion (1906) 185 N. Y. 577, 78 N. E. 1114.

Leases.—The section excludes leases for less than three years from its operation. *United States Oxygen Co. v. Berge*, (1912) 136 N. Y. S. 297; *Op. Atty.-Gen.* (1910) 645. See also *Lovejoy*, (1905) 48 Misc. 611, 5 N. Y. S. 552; *Op. Atty.-Gen.* (1910) 645. But a lease for a term exceeding three years is within this section. *City Bank v. Hocke*, (1915) 168 App. Div. 83, 153 N. Y. S. 731. See also *People v. State Board of Tax Commissioners*, (1912) 153 App. Div. 532, 138 N. Y. S. 344; *Merrill v. Hodgkins*, (1911) 134 N. Y. S. 166; *Stotts v. Tuska*, (1902) 76 App. Div. 137, 78 N. Y. S. 687; *People v. Gass*, (1907) 53 Misc. 363, 104 N. Y. S. 884, affirmed 120 App. Div. 147, 104 N. Y. S. 885, which affirmed without opinion (1908) 190 N. Y. 565, 83 N. E. 1129; *Jokinsky v. Miller*, (1904) 44 Misc. 239, 88 N. Y. S. 928. And a recorded lease is constructive notice to one who acquires rights subsequent thereto. *Stotts v. Tuska*, (1902) 76 App. Div. 137, 78 N. Y. S. 687.

Agreement for sale of standing timber.—Standing trees form part of the land and therefore real property; and a contract for their sale is a contract for the sale of an interest in land within the intent and meaning of the recording acts. *Vorebeck v. Roe*, (1867) 50 Barb. 302.

Equitable interest.—Conveyances of equitable interests in land are within the recording acts. *Tarbell v. West*, (1881) 86 N. Y. 280.

Declaration of trust.—This section embraces a declaration of trust, and its record is notice to a subsequent grantee. *McArthur v. Gordon*, (1889) 51 Hun 511, 4 N. Y. S. 584, affirmed (1891) 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667.

Registration of farm name.—An instrument for the purpose of recording a farm name (L. 1912, ch. 145) is not a "conveyance" as defined in this section. *Op. Atty.-Gen.* (1912) 389.

Easements.—Easements capable of physical examination are embraced within the statute and are subject to the same law of notice as conveyances of a fee. *Ward v. Metropolitan El. R. Co.*, (1894) 82 Hun 545, 31 N. Y. S. 527, affirmed (1897) 152 N. Y. 39, 46 N. E. 319. But an easement, after having been extinguished by agreement, cannot be made the subject of a conveyance, as "having been extinguished it could be brought into existence again only by the act of the owner of the servient estate or by prescriptive use." *Snell v. Levitt*, (1888) 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414, reversing 39 Hun 227.

Mortgage.—A mortgage is a conveyance within this section. *Gibson v. Thomas*, (1905) 180 N. Y. 483, 73 N. E. 484, 70 L. R. A. 768, affirming 85 App. Div. 243, 83 N. Y. S. 552; *O'Brien v. Fleckenstein*, (1903) 86 App. Div. 140, 83 N. Y. S. 499, affirmed (1905) 180 N. Y. 350, 73 N. E. 30, 105 A. S. R. 768; *Larned v. Donovan*, (1895) 84 Hun 533, 32 N. Y. S. 731, affirmed (1898) 155 N. Y. 341, 49 N. E. 942; *Ward v. Isbill*, (1893) 73 Hun 550, 26 N. Y. S. 141; *Gray v. Delpho*, (1916) 97 Misc. 37, 162 N. Y. S. 194; *Schmidt v. Hoyt*, (1833) 1 Edw. 651.

Mortgage to secure future advances.—A mortgage given to secure future advances or indorsements is valid and is a conveyance within the recording acts. Such a mortgage, duly recorded, has a preference over subsequent judgments against the mortgagor, as well as to indorsements or advances made upon the faith thereof subsequent to the rendition of the judgments,

without notice thereof as to those previously made; and this without regard to the question whether the indorsements or advances were optional or obligatory. *Ackerman v. Hunsicker*, (1881) 85 N. Y. 43, 39 Am. Rep. 621, reversing 21 Hun 53; *Truscott v. King*, (1849) 6 Barb. 346, affirmed (1851) 6 N. Y. 147.

Mortgage on leasehold interest.—A mortgage on a lease of real property is a conveyance and comes within the recording act. *People v. Gass*, (1907) 120 App. Div. 147, 104 N. Y. S. 885, affirmed without opinion (1908) 190 N. Y. 565, 83 N. E. 1129.

Transfer of mortgage without debt.—A mortgage is but an incident to the debt which it is intended to secure and a transfer of the mortgage, without the debt, is a nullity, and no interest is acquired by it. The security cannot be separated from the debt, and exist independently of it. *Merritt v. Bartholick*, (1867) 36 N. Y. 44, affirming 47 Barb. 253.

Release and subsequent assignment.—A release of a portion of mortgaged premises has been held void as against a subsequent assignment of the mortgage which was first recorded. *Gibson v. Thomas*, (1903) 85 App. Div. 243, 83 N. Y. S. 552, affirmed (1905) 180 N. Y. 483, 73 N. E. 484, 70 L. R. A. 768. See also *Baker v. Thomas*, (1891) 61 Hun 17, 15 N. Y. S. 359.

Assignment of same mortgage to different parties.—Where an attorney at law, being the real mortgagee in interest, had a mortgage executed to his clerk and thereafter assigned the genuine bond together with a forged mortgage, the genuine mortgage passed under the assignment, and a subsequent assignment of the genuine mortgage as collateral to a forged bond to another person passed no title, the assignor having none to pass. The first assignment having been recorded before the second assignment, the title of the first assignee was protected by the recording acts. *Goettlicher v. Wille*, (1913) 156 App. Div. 392, 134 N. Y. S. 977, 141 N. Y. S. 1121.

Agreement to take mortgage.—An instrument under which a contractor agreed to take a second mortgage in lieu of the final payment for the alteration of a building, if the owner so desired, was held not to constitute an equitable mortgage nor to be an "instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected," and was therefore not required to be recorded. *Davidson v. Fox*, (1901) 65 App. Div. 262, 73 N. Y. S. 533.

Agreement to give mortgage.—A mere executory contract to give a mortgage upon the happening of a certain contingency, such as the discontinuance of a foreclosure action, was held, although recorded, not to create any lien upon property and to be unenforceable by action. *Mathews v. Damainville*, (1905) 109 App. Div. 311, 91 N. Y. S. 524.

Agreement to assume mortgage.—One who purchases a part of mortgaged lands and agrees with his grantor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption by agreement made with his grantor while the latter is still the owner of the residue, and a grantee of the residue, after such discharge, cannot claim the benefit of the assumption. The grantee succeeds only to the equities of his grantor, existing at the time of the conveyance, and that without regard to any question of notice, such agreement not being within the recording act. *Judson v. Dada*, (1880) 79 N. Y. 373.

Mortgage with covenant to keep buildings insured.—The recording of a mortgage containing a covenant to keep the buildings on the mortgaged premises insured does not charge a subsequent incumbrancer with constructive notice of the covenant, the recording act having no application thereto. *Dunlop v. Avery*, (1882) 89 N. Y. 592, reversing 23 Hun 509.

Assignment of mortgage.—An assignment of a mortgage is a conveyance within the meaning of the recording acts. *Syracuse Sav. Bank v. Merrick*, (1905) 182 N. Y. 387, 75 N. E. 232, reversing 96 App. Div. 581, 89 N. Y. S. 238; *Gibson v. Thomas*, (1905) 180 N. Y. 483, 73 N. E. 484, 70 L. R. A. 768, affirming 85 App. Div. 243, 83 N. Y. S. 552; *Curtis v. Moore*, (1897) 152 N. Y. 159, 46 N. E. 168, 57 A. S. R. 506, affirming 10 Misc. 341, 31 N. Y. S. 19; *Brewster v. Carnes*, (1886) 103 N. Y. 556, 9 N. E. 323; *Bacon v. Van Schoonhoven*, (1882) 87 N. Y. 446, affirming 19 Hun 158; *Decker v. Boice*, (1880) 83 N. Y. 215, affirming 19 Hun 152; *Westbrook v. Gleason*, (1879) 79 N. Y. 23, reversing 14 Hun 245; *Van Keuren v. Corkins*, (1876) 66 N. Y.

77, affirming 4 Hun 129; *Greene v. Warnick*, (1876) 64 N. Y. 220, reversing 4 Hun 703; *Weideman v. Zielinska*, (1905) 102 App. Div. 163, 92 N. Y. S. 493; *Larned v. Donovan*, (1895) 84 Hun 533, 32 N. Y. S. 731, affirmed (1898) 155 N. Y. 341, 49 N. E. 942; *Baker v. Thomas*, (1891) 61 Hun 17, 15 N. Y. S. 359, 39 N. Y. St. Rep. 816; *Breed v. National Bank*, (1901) 57 App. Div. 468, 68 N. Y. S. 68, affirmed without opinion (1902) 171 N. Y. 648, 63 N. E. 1115; *Briggs v. Thompson*, (1895) 86 Hun 607, 33 N. Y. S. 765; *Thomas v. Zahka*, (1917) 99 Misc. 333, 164 N. Y. S. 193. The only effect of recording the assignment of a mortgage is to protect the assignee from a subsequent sale of the same mortgage. If the assignment is not recorded it is void as against a subsequent purchaser of the same mortgage. *Greene v. Warnick*, (1876) 64 N. Y. 220, reversing 4 Hun 703; *Gray v. Delpho*, (1916) 97 Misc. 37, 162 N. Y. S. 194. See also *Broun v. Johnston*, (1879) 7 Abb. N. Cas. 188.

Conveyance to mortgagee after assignment of mortgage.—A conveyance to the mortgagee after an assignment of the mortgage is not a merger of the mortgage; nor can the conveyance by the mortgagee, although recorded before the recording of the assignment, operate as a transfer of the mortgage so as to be deemed a subsequent assignment thereof, within the recording act. *Purdy v. Huntington*, (1870) 42 N. Y. 334, 1 Am. Rep. 532, reversing 46 Barb. 339.

Release or satisfaction of mortgage.—A release of a mortgage has been held to be a conveyance within the meaning of the recording act. *Briggs v. Thompson*, (1895) 86 Hun 607, 33 N. Y. S. 765; *Baker v. Thomas*, (1891) 61 Hun 17, 15 N. Y. S. 359. See also dissenting opinion per Vann, J., in *Frear v. Sweet*, (1890) 118 N. Y. 454, 23 N. E. 910. And the same has been declared of a satisfaction. *Bacon v. Van Schoonhoven*, (1882) 87 N. Y. 446, affirming 19 Hun 158; *Thomas v. Zahka*, (1917) 99 Misc. 333, 164 N. Y. S. 193. See also *Clark v. Mackin*, (1884) 95 N. Y. 346, modifying 30 Hun 411. But compare *Blume v. Lundy*, (1911) 130 N. Y. S. 836, in which it was declared that a discharge of mortgage conveys no interest in real property, and is therefore not a conveyance within the meaning of this section.

Extension agreement.—An agreement extending the time of payment of a mortgage and also reducing the rate of interest, is within the provisions of the statute and entitled to be recorded. *Weideman v. Zielinska*, (1905) 102 App. Div. 163, 92 N. Y. S. 493.

Contract for sale of land.—A mere contract for the sale of land of itself does not constitute an incumbrance or a lien upon real estate or a cloud upon the title thereto even if executed by the owner of the land. The record of it in no way adds to its force or validity. The only effect of the statutory provisions for the recording of contracts for the sale of lands is to preserve evidence and facilitate proof thereof. The record is not constructive notice to subsequent purchasers or incumbrancers, and no action can be maintained to cancel it as a cloud on the title. *Washburn v. Burnham*, (1875) 63 N. Y. 132. See also *Boyd v. Schlesinger*, (1874) 59 N. Y. 301.

Consents for construction of street railway.—Consents by abutting owners for the construction of a street railway are not mere licenses to be revoked at will or by the transfer of the property before the construction of the railway, nor do they contemplate a conveyance of real estate so as to bring them within the provisions of this section and those of section 290, *supra*. *Adee v. Nassau Electric R. Co.*, (1907) 65 App. Div. 529, 72 N. Y. S. 992, affirmed without opinion (1902) 173 N. Y. 580, 65 N. E. 1113.

Transfer of personal property.—The recording act does not contemplate or require that a transfer of personal property shall be filed. *National Hudson River Bank v. Shaskin*, (1898) 28 App. Div. 311, 51 N. Y. S. 64.

Assignment of rents.—An assignment of rents is not within the recording act, as it in no wise affects the title to land nor does it create a lien or incumbrance thereon. *Harris v. Taylor*, (1898) 35 App. Div. 462, 54 N. Y. S. 864, appeal dismissed (1899) 159 N. Y. 533, 53 N. E. 1126.

Will.—A will is not a conveyance within the definition of the recording acts, but as early as 1846 wills of real estate were authorized to be recorded in county clerks' offices and this was to give notice to would-be purchasers of the interest devised by the will. *Jefferson v. Bangs*, (1915) 169 App. Div. 102, 154 N. Y. S. 439. See DECEDENT ESTATE LAW, § 42.

III. SUBSEQUENT PURCHASER IN GOOD FAITH AND FOR A VALUABLE CONSIDERATION

1. Generally

General meaning of phrase.—The phrase a “purchaser in good faith and for a valuable consideration” is not peculiar to the recording acts, but is one of frequent occurrence in the statutes, and is “an expression which has been borrowed from the language of courts of equity, and should be interpreted in the sense in which it is there understood.” *Ten Eyck v. Witbeck*, (1892) 135 N. Y. 40, 31 N. E. 994, 31 A. S. R. 809, reversing 61 Hun 620 mem., 15 N. Y. S. 418, 39 N. Y. St. Rep. 634.

“Subsequent” conveyance.—The provision of the section declaring every conveyance void as against a subsequent bona fide purchaser, does not apply where two mortgages are executed at the same time, as neither one, although first recorded, is a subsequent conveyance. *Greene v. Warnick*, (1876) 64 N. Y. 220, reversing 4 Hun 703. See also *Smyth v. Knickerbocker Life Ins. Co.*, (1881) 84 N. Y. 589, affirming 21 Hun 241; *Wilcox v. Drought*, (1902) 71 App. Div. 402, 75 N. Y. S. 960; *Rhoades v. Canfield*, (1841) 8 Paige 545.

Reliance on record.—A subsequent purchaser of a mortgage in good faith and for value may rely upon the record as to the title of his assignor. *Syracuse Sav. Bank v. Merrick*, (1904) 96 App. Div. 581, 89 N. Y. S. 238, reversed on other grounds (1905) 182 N. Y. 387.

Burden of proof.—It has been declared that to enable a subsequent purchaser to assail a prior unrecorded mortgage it is incumbent upon him to show not only that he was a bona fide purchaser for value without notice, but that his conveyance was first recorded. *Westbrook v. Gleason*, (1879) 79 N. Y. 23, reversing 14 Hun 245; *Breed v. National Bank*, (1901) 57 App. Div. 468, 68 N. Y. S. 68, affirmed without opinion (1902) 171 N. Y. 648, 63 N. E. 1115. But it seems nevertheless that a junior purchaser whose deed is first recorded is presumptively a bona fide purchaser for a valuable consideration, without notice, and the burden of proof to the contrary rests upon the senior purchaser whose deed has not been recorded. *Gratz v. Land, etc., Imp. Co.*, (1897) 82 Fed. 381, 53 U. S. App. 499, 27 C. C. A. 305, 40 L. R. A. 393, writ of certiorari dismissed 173 U. S. 705, 19 S. Ct. 884, 43 U. S. (1. ed.) 1186. See also *Brown v. Volkening*, (1876) 64 N. Y. 169; *Beman v. Douglas*, (1896) 1 App. Div. 169, 37 N. Y. S. 859; *Ward v. Isbill*, (1893) 73 Hun 550, 26 N. Y. S. 141.

2. Purchaser

Mortgagee.—A mortgagee is a “purchaser” within the meaning of the section. *Larned v. Donovan*, (1895) 84 Hun 533, 32 N. Y. S. 731, affirmed (1898) 155 N. Y. 341, 49 N. E. 942; *Gray v. Delpho*, (1916) 97 Misc. 37, 162 N. Y. S. 194. Compare *Berry v. Mutual Ins. Co.*, (1817) 2 Johns. Ch. 603.

Assignee of mortgage.—A “purchaser,” as defined by the section, includes every assignee of a mortgage. *Frear v. Sweet*, (1890) 118 N. Y. 454, 23 N. E. 910; *Gray v. Delpho*, (1916) 97 Misc. 37, 162 N. Y. S. 194; *Larned v. Donovan*, (1895) 84 Hun 533, 32 N. Y. S. 731, affirmed (1898) 155 N. Y. 341, 49 N. E. 942. Compare *Hoyt v. Hoyt*, (1861) 8 Bosw. 511.

Heir as “purchaser” from ancestor.—While an heir is not a “purchaser” from his ancestor within the protection of the recording acts, when heirs who have come into the inheritance voluntarily partition the real estate upon the faith of the record title each becomes a purchaser from the other and is protected against an outstanding unrecorded deed of which he had no knowledge where the grantee was not in possession. *McNally v. Fitzsimons*, (1902) 70 App. Div. 179, 75 N. Y. S. 331.

Judgment creditor.—A judgment creditor is not a purchaser within the meaning of this section, and an unrecorded deed or mortgage takes preference over a subsequent judgment unless there is a superior equity in favor of the holder of the latter. *Sullivan v. Corn Exch. Bank*, (1912) 154 App. Div. 292, 139 N. Y. S. 97; *Obermeyer v. Jung*, (1900) 51 App. Div. 247, 64 N. Y. S. 959; *Adirondack Hardware Co. v. Walsh*, (1911) 74 Misc. 594, 134 N. Y. S. 562.

See also *Sweetland v. Buell*, (1900) 164 N. Y. 541, 58 N. E. 663, 79 A. S. R. 676, affirming 89 Hun 543, 35 N. Y. S. 346; *Howells v. Hettrick*, (1899) 160 N. Y. 308, 54 N. E. 677, affirming 13 App. Div. 366, 43 N. Y. S. 183; *Hooker v. Pierce*, (1842) 2 Hill 650. In the absence of fraud, a judgment takes effect only on the actual interest in land which the judgment debtor has at the time of the recovery of the judgment, and consequently the title of a grantee of the judgment debtor, by deed executed before the entry of the judgment, although unrecorded, takes precedence of the judgment. The fact that the grantee has not recorded his deed creates no equity in favor of the judgment creditor. The latter is not a purchaser within the recording acts, and purchasers alone are protected by those acts against unrecorded conveyances. *Trenton Banking Co. v. Duncan*, (1881) 86 N. Y. 221.

Trustees in bankruptcy.—Trustees in bankruptcy are not purchasers. The title and ownership of the real property of the bankrupt vests in them by operation of law, subject to all existing valid liens not affected by fraud and equities in favor of other parties. In *re Mosher*, (1915) 224 Fed. 739.

3. Good Faith

Generally.—To be a bona fide purchaser under the recording acts, one must buy without any intimation whatever of a defect the grantor's title, however technical it may be, at the risk of losing his purchase, not only because of the defect of which he has notice but of any other defect that may exist whether he knows anything of it or not. *Todd v. Eighth*, (1896) 10 App. Div. 142, 41 N. Y. S. 1013. "The true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part." *Williamson v. Brown*, (1857) 15 N. Y. 354.

Possession as notice.—Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser, and the character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record. *Brown v. Volkening*, (1876) 64 N. Y. 76. See also *Pope v. Allen*, (1882) 90 N. Y. 298; *Trombly v. Turner*, (1906) 116 App. Div. 74, 101 N. Y. S. 27, affirmed without opinion (1908) 193 N. Y. 624, 86 N. E. 1134; *Barber v. Hudson River Telephone Co.*, (1905) 105 App. Div. 154, 93 N. Y. S. 993; *Rourke v. Murphy*, (1883) 12 Abb. N. Cas. 402; *Grimstone v. Carter*, (1832) 3 Paige 420; *Simon v. Kaliske*, (1869) 37 How. Pr. 249; *Harris v. Norton*, (1853) 16 Barb. 264.

This section will not protect a purchaser of lands across which a road passes, where evidence shows "that the road was physically defined, apparent, across the lands of the defendant." *Hey v. Collman*, (1903) 78 App. Div. 584, 79 N. Y. S. 778, affirmed without opinion (1905) 180 N. Y. 560, 73 N. E. 1125. See also *Taylor v. Millard*, (1890) 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667, affirming 42 Hun 363, 4 N. Y. St. Rep. 826.

Where a tenant is in open, visible, and continuous possession under a lease for a term exceeding three years, one taking a subsequent mortgage upon the premises is charged with notice of the prior lease, although it is not recorded, and is not an incumbrancer in good faith within the meaning of the recording act. *City Bank v. Hocke*, (1915) 168 App. Div. 83, 153 N. Y. S. 731. See also *People v. State Board of Tax Comrs.*, (1912) 153 App. Div. 532, 138 N. Y. S. 314; *Stolts v. Tuska*, (1902) 76 App. Div. 137, 78 N. Y. S. 687; *Merrill v. Hodgkins*, (1911) 134 N. Y. S. 166.

Notice after purchase.—The fact that a subsequent mortgagee, after the execution and delivery of his mortgage, and after he had parted with the consideration therefor, but before it was recorded, had notice of the prior mortgage, does not affect the priority of his lien. *Constant v. Rochester University*, (1892) 153 N. Y. 640, 31 N. E. 26.

Purchaser from good faith purchaser.—A purchaser from one who is protected by the recording act against a prior unrecorded conveyance is himself entitled to such protection, notwithstanding he purchased with notice of the prior conveyance, or without parting with a valuable consideration. *Wood v. Chapin*, (1856) 13 N. Y. 509, 67 Am. Dec. 62.

Transfer made four months prior to bankruptcy.—In a fraudulent transaction the grantee is presumed to be a party to the fraud and does not occupy the position of an innocent holder for value. If, therefore, an instrument has been made by a bankrupt and recorded within the statutory period of four months it is a question of fact whether it was done with intent to defraud, hinder, or delay his creditors, or to give a preference to any one of them. A transfer made with this intent in view may be set aside if recorded within the prescribed period. *In re McKane*, (1907) 155 Fed. 674.

4. Consideration

Seal as presumptive evidence of consideration: see Code Civ. Pro., § 840.

Generally.—To override the title acquired under a prior unrecorded deed the purchaser or mortgagee must on the faith of his purchase pay some new consideration or part with some value or right. *Lehrenkrauss v. Bonnell*, (1910) 199 N. Y. 240, 92 N. E. 637, reversing 138 App. Div. 493, 122 N. Y. S. 866. But while, in order to give one the character of a purchaser in good faith for a valuable consideration, it must appear that something of pecuniary value for the property was paid or parted with, the pecuniary consideration expressed, of which receipt is acknowledged in the instrument, is prima facie evidence that such was the consideration actually paid. *Hendy v. Smith*, (1888) 49 Hun 510, 2 N. Y. S. 535. See also *Page v. Waring*, (1879) 76 N. Y. 463; *De Lancey v. Stearns*, (1876) 66 N. Y. 157; *Wood v. Chapin*, (1856) 13 N. Y. 509, 67 Am. Dec. 62; *Jackson v. McChesney*, (1827) 7 Cow. 360, 17 Am. Dec. 521; *Webster v. Van Steenbergh*, (1864) 46 Barb. 211; *Pickett v. Barron*, (1859) 29 Barb. 505; *Dickinson v. Tillinghast*, (1833) 4 Paige 215. A valuable consideration expressed in a deed is prima facie evidence that the grantee was a purchaser in good faith; and where a consideration is so expressed no proof of actual payment is required. *Lacustrine Fertilizer Co. v. Lake Guano, etc., Co.*, (1880) 82 N. Y. 476, affirming 19 Hun 47; *Wood v. Chapin*, (1856) 13 N. Y. 509, 67 Am. Dec. 62; *Ward v. Isbill*, (1893) 73 Hun 550, 26 N. Y. S. 141. See also *Kine v. Farrell*, (1902) 71 App. Div. 219, 75 N. Y. S. 542.

One dollar as consideration.—In *Hendy v. Smith*, (1888) 49 Hun 510, 2 N. Y. S. 535, the question arose as to whether the acknowledgment of the receipt of one dollar was sufficient to establish the plaintiff's relation of a purchaser in good faith and for a valuable consideration. It was contended on the part of the defense that it was merely nominal and did not import such consideration so as to render the plaintiff a bona fide purchaser. The court said: "It may be observed that the question is not one of adequacy, but of character of the consideration. And in view of the rule of evidence before stated, it must, we think, be assumed that one dollar was paid upon the purchase and for the conveyance. That would seem to be sufficient."

Distinction between good and valuable consideration.—There is a wide distinction between a good and a valuable consideration, when the latter term is used in the statutes defining the rights of a subsequent purchaser. Blood, love and affection, a precedent indebtedness, and the like, are sufficient as a consideration between the parties, but not potential enough to override the prior equities of others in the property conveyed. *Ten Eyck v. Witbeck*, (1892) 135 N. Y. 40, 31 N. E. 994, 31 A. S. R. 809, reversing 61 Hun 620 mem., 15 N. Y. S. 118, 39 N. Y. St. Rep. 631.

Extension of time for payment.—A creditor who gives a valid extension of the time of payment of a pre-existing debt and takes a mortgage as security for the same is thereby constituted and given the character of a bona fide purchaser for a valuable consideration, within the meaning of the

recording acts, and this mortgage takes priority over a mortgage previously given by the same mortgagor to another mortgagee, which is not recorded until after the second mortgage. *O'Brien v. Fleckenstein*, (1905) 180 N. Y. 350, 73 N. E. 30, 105 A. S. R. 768, affirming 86 App. Div. 140, 83 N. Y. S. 499. See also *Douglas v. Miller*, (1905) 102 App. Div. 94, 92 N. Y. S. 514; *Adirondack Hardware Co. v. Walsh*, (1911) 74 Misc. 594, 134 N. Y. S. 562.

Agreement not to sue.—A mortgage given to a bank in pursuance of an agreement that the bank should refrain from suing the mortgagor upon a note until the bank could ascertain by the foreclosure of another mortgage, held against another party, who was the maker of the note in question and of other notes, and how much would remain unpaid upon the note, was held to constitute the bank a holder for value, and to entitle it, as against a prior unrecorded mortgage, to the benefit of the statute. *Durkee v. National Bank*, (1885) 36 Hun 565.

Agreement to support for life.—An agreement to support one for life actually executed is a valuable consideration, which will sustain the right of a grantee to a deed taken without notice of a prior unrecorded deed. *Northup v. Coon*, (1912) 154 App. Div. 337, 138 N. Y. S. 1044.

§ 292. By whom conveyance must be acknowledged or proved.

Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

This section was derived from Real Property Law of 1896, § 242.

Section 292 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 93.

Requisites of acknowledgments: see *infra*, § 303.

Proof by subscribing witness: see *infra*, § 304.

Certificate of acknowledgment or proof: see *infra*, § 306.

Acknowledgment by corporation: see *infra*, § 309.

Acknowledgment of certificate of redemption of real property sold under execution: see Code Civ. Pro., § 1470.

By whom conveyance to be executed for realty sold under execution: see Code Civ. Pro., § 1471.

Acknowledgment and proof generally: see GENERAL CONSTRUCTION LAW, §§ 10, 11.

Recording conveyance without being acknowledged: see PENAL LAW, § 1862.

Meaning of term "acknowledgment."—The term "acknowledgment" as commonly used by the legislature, the courts, and the bar, means both the act and the written evidence thereof made by the officer, and an instrument is not "duly acknowledged" unless there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subject. *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 159, 35 N. Y. S. 17.

Purpose of acknowledgment and proof.—The acknowledgment and proof of deeds is for the purpose of recording them, to make title secure, and to prevent frauds in conveyancing. *Armstrong v. Combs*, (1897) 15 App. Div. 246, 44 N. Y. S. 171; *Jackson v. Schoonmaker*, (1809) 4 Johns. 161. A conveyance of lands can be proved only by the acknowledgment to a public officer of its execution by the person making it, or by the affidavit of a subscribing witness having a place of residence, which must be stated to the officer taking the proof, and inserted by him in the certificate required to be made and indorsed on the conveyance. *Irving v. Campbell*, (1890) 121 N. Y. 355, 24 N. E. 321, 8 L. R. A. 620, reversing 56 Super. Ct. 224.

Sufficiency of proof in lieu of acknowledgment.—Where, under section 2 of the Railroad Law, providing that fifteen or more persons may become a corporation for the purpose of building or operating a railroad "by executing, acknowledging and filing" the certificate required, a certificate signed by fifteen incorporators, only four of whom acknowledged the execution of the paper, was held insufficient, although there appeared upon it an affidavit

signed by one of the four acknowledging incorporators, in which he sought, as a subscribing witness, to make proof of the execution of the instrument by the other eleven incorporators, it nowhere appearing, however, that he signed as a subscribing witness. *People v. Railroad Comrs.*, (1902) 75 App. Div. 106, 77 N. Y. S. 380.

Proof of certificate of incorporation.—The attorney-general has ruled that the secretary of state is not authorized to file the certificate of incorporation of a business corporation where the execution of it by the incorporators is proved by a subscribing witness and not by acknowledgment. *Op. Att.-Gen.* (1911) 651. See *BUSINESS CORPORATIONS LAW*, § 2 note.

Discrepancy as to dates.—Where the execution of a deed is proved by the subscribing witness a discrepancy of one day between the date of the deed and the date under the signature of the subscribing witness does not justify the rejection of the title. *Bowers v. Duryea*, (1908) 58 Misc. 525, 109 N. Y. S. 756.

Cited.—This section was cited in *Lovett v. Steam Saw Mill Assn.*, (1836) 6 Paige 54.

§ 293. Recording of conveyances heretofore acknowledged or proved. A conveyance of real property, within the state, heretofore executed, and heretofore acknowledged or proved, and certified, so as to be entitled to be read in evidence, or recorded, under the laws in force at the time when so acknowledged or proved, but which has not been recorded is entitled to be read in evidence, and recorded in the same manner, and with the like effect, as if this chapter had not been passed. If heretofore executed, but not proved or acknowledged, it may be proved or acknowledged in the same manner as conveyances hereafter executed and with like effect.

This section was derived from Real Property Law of 1896, § 243.

Section 293 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 94.

Conveyance when acknowledged or proved as evidence: see Code Civ. Pro., § 935.

Conveyance of land without the state as evidence: see Code Civ. Pro., §§ 946, 947.

Proof of instrument by submitting disputed and genuine handwriting: see Code Civ. Pro., § 961d.

Proof of lost execution or writ under which sheriff's sale of real property was made: see Code Civ. Pro., § 961e.

Proof according to rules of common law: see Code Civ. Pro., § 962.

Recording conveyance without acknowledgment: see PENAL LAW, § 1862.

Certificate of acknowledgment as conclusive. Where an owner executes and delivers a deed of real property containing a certificate of his appearance before an officer authorized by law to take acknowledgments, at a place within his jurisdiction, and an acknowledgment of its execution, and the certificate is signed by the officer, the grantor cannot subsequently allege the invalidity of the certificate, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee. *Mutual Life Ins. Co. v. Corey*, (1892) 135 N. Y. 326, 31 N. E. 1095, reversing 54 Hun 493, 7 N. Y. S. 939.

Authenticated copies of deeds as evidence.—Authenticated copies of deeds, purported to be executed and duly acknowledged in 1822, so as to entitle them to be recorded, but not recorded until 1843, are competent and prima facie evidence of the execution and delivery of the deeds. *Dempsey v. Tyler*, (1854) 3 Duer 73.

§ 294. Recording executory contracts and powers of attorney. An executory contract for the sale or purchase of real property,

or an instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved, and certified, in the manner to entitle a conveyance to be recorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated.

This section was derived from Real Property Law of 1896, § 244.

Section 294 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 95.

How power must be executed: see *supra*, § 165.

Recording revocation of power of attorney: see *infra*, § 326.

What instruments may be recorded under section.—Under this section only executory contracts for the sale or purchase of land and powers of attorney authorizing the sale of land may be recorded. *Davidson v. Fox*, (1901) 65 App. Div. 262, 73 N. Y. S. 533.

Failure to state identity of person executing power of attorney.—A power of attorney is defective where the notary taking the acknowledgment did not state that the person who appeared before him was known to him to be the person described in and who executed the power of attorney. Such information must be contained in the certificate of acknowledgment, and unless it is the paper is not entitled to be recorded. (See *infra*, § 303.) *Paolillo v. Faber*, (1900) 56 App. Div. 241, 67 N. Y. S. 638.

Power of attorney from married woman to husband.—Under the act of 1878 (L. 1878, ch. 300), authorizing a married woman "to execute, acknowledge and deliver her power of attorney with like force and effect and in the same manner as if she were a single woman," it was held that she might by such a power appoint her husband her attorney in fact. *Wronkow v. Oakley*, (1892) 133 N. Y. 505, 31 N. E. 521, 28 A. S. R. 661, 16 L. R. A. 209, reversing 64 Hun 217, 19 N. Y. S. 51. See DOMESTIC RELATIONS LAW, § 51 note, II, *Conveyances by married women*.

Transcript of power of attorney as evidence.—Under Code Civ. Pro., § 933, a duly certified transcript of a power of attorney authorizing the conveyance of land, recorded in the clerk's office of the county in which the land is situated, is competent as evidence. *Lerche v. Brasher*, (1887) 104 N. Y. 157, 10 N. E. 58, reversing 37 Hun 385.

§ 295. Recording of letters patent. Letters patent, issued under the great seal of the state, granting real property, may be recorded in the county where such property is situated, in the same manner and with like effect, as a conveyance duly acknowledged or proved and certified so as to entitle it to be recorded.

This section was derived from Real Property Law of 1896, § 245.

Section 295 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 96.

Letters patent to be recorded in office of secretary of state: see PUBLIC LANDS LAW, § 5.

Action to vacate letters patent: see Code Civ. Pro., § 1957 et seq.

Great seal of state: see STATE LAW, § 73.

Right to issue letters patent.—The state has succeeded to all the rights of both the crown and parliament of England in the navigable waters within its limits, and in the soil under them. It holds them as absolute owner, and, except as restrained by constitutional limitations, its right to grant them is absolute and uncontrollable, and where valid grants are once made by the state the property granted can be resumed by it only under the power of eminent domain. *Langdon v. New York*, (1883) 93 N. Y. 129. See also *People v. New York, etc., Ferry Co.*, (1877) 68 N. Y. 71, reversing 7 Hun 105, as to extra allowance.

Certified copy of letters patent as evidence.—The statutes prior to chapter 517 of the Laws of 1896 furnish ample authority in law for the recording of

land patents in the office of the secretary of state; and that being so, section 933 of the Code of Civil Procedure makes a certified copy of a patent so recorded evidence which the court is bound to receive. *New York Cent., etc., R. Co. v. Brockway Brick Co.*, (1899) 158 N. Y. 470, 53 N. E. 209, affirming 10 App. Div. 387, 41 N. Y. S. 762.

§ 296. Recording copies of instruments which are in secretary of state's office. A copy of an instrument affecting real property, within the state, recorded or filed in the office of the secretary of state, certified in the manner required to entitle the same to be read in evidence, may be recorded with such certificate in the office of any recording officer of the state.

This section was derived from Real Property Law of 1896, § 246.

Section 296 of the Real Property Law of 1896 is now covered by Decedent Estate Law, § 97.

When other authentication necessary: see *infra*, § 311.

Official certificates as evidence: see Code Civ. Pro., §§ 921, 922.

Record of conveyance as evidence: see Code Civ. Pro., § 935.

§ 297. Certified copies may be recorded. A copy of a record, or of any recorded instrument, certified or authenticated so as to be entitled to be read in evidence, may be again recorded in any office where the original would be entitled to be recorded. Such record has the same effect as if the original were so recorded. A copy of a conveyance or mortgage affecting separate parcels of real property situated in different counties, or of the record of such conveyance or mortgage in one of such counties, certified or authenticated so as to be entitled to be read in evidence, may be recorded in any county in which any such parcel is situated, with the same effect as if the original instrument authenticated as required by section three hundred and ten of this chapter were so recorded.

This section was derived from Real Property Law of 1896, § 247.

Record of conveyance as evidence: see Code Civ. Pro., § 935.

Official certificates as evidence: see Code Civ. Pro., §§ 921, 922.

§ 298. Acknowledgments and proofs within the state. The acknowledgment or proof of a conveyance of real property within the state may be made at any place within the state, before a justice of the supreme court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds, except that such an acknowledgment or proof of conveyance may be taken by a justice of the peace anywhere within the county containing the town or city in which he is authorized to perform official duties.

This section was derived from Real Property Law of 1896, § 248. It was amended by L. 1915, ch. 190, § 1. The amendment added the last part of

the section beginning with the words "except that such an acknowledgment. . . ."

Before whom acknowledgments may be taken: see Code Civ. Pro., § 842.

Power of surrogate to take proof and acknowledgment of deeds: see Code Civ. Pro., § 2490, subd. 12.

Meaning of "acknowledged, or proved, and duly certified," as used in Surrogates' Courts Act: see Code Civ. Pro., § 2768, subd. 15.

Powers and duties of notary public: see EXECUTIVE LAW, § 105.

Notary's certificate as evidence: see Code Civ. Pro., § 923.

Commissioners of deeds within the state: see EXECUTIVE LAW, § 106.

Criminal liability of notary public or commissioner of deeds acting without appointment: see PENAL LAW, § 1820.

False certificate of acknowledgment: see PENAL LAW, § 885.

Meaning of term "judge" generally: see GENERAL CONSTRUCTION LAW § 26.

Object of acknowledgment.—The object of acknowledgment and record is to make title secure and prevent frauds in conveyancing, as well as to furnish proof of the due execution of conveyances. *Armstrong v. Combs*, (1897) 15 App. Div. 246, 44 N. Y. S. 171.

Authority to take acknowledgments.—The power to take acknowledgments rests entirely upon the authority conferred by statute, and it has been held that a police magistrate of the city of New York has no authority to take acknowledgments. *Tully v. Lewitz*, (1906) 50 Misc. 350, 98 N. Y. S. 829. See also *Lynch v. Livingston*, (1852) 6 N. Y. 422, affirming 8 Barb. 463.

Delegation of powers by notary public.—A notary public cannot delegate his authority to another person. *Sheldon v. Benham*, (1843) 4 Hill 129, 40 Am. Dec. 271; *Onondaga County Bank v. Bates*, (1842) 3 Hill 53.

Venue.—An affidavit must be taken within the jurisdiction of the notary; otherwise it is a nullity. *Schiff v. Leipziger Bank*, (1901) 65 App. Div. 33, 72 N. Y. S. 513. See to the same effect *Matter of Booth*, (1882) 11 Abb. N. Cas. 145; *People v. Globe Mutual Life Ins. Co.*, (1822) 65 How. Pr. 239. See also *Robinson v. Cooper*, (1909) 62 Misc. 517, 115 N. Y. S. 599. A notary's certificate of acknowledgment without any venue is defective, since he is a local officer, and it must appear on the face of the certificate that the acknowledgment was taken within his territorial jurisdiction. *Thompson v. Burhans*, (1874) 61 N. Y. 52, reversing 61 Barb. 260. See also *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 159, 35 N. Y. S. 17.

Omission of letters "ss." from venue.—The omission of the letters "ss." from the venue of an acknowledgment is immaterial. *Babcock v. Kuntzsch*, (1895) 85 Hun 33, 32 N. Y. S. 587.

Venue of acknowledgment as evidence.—The venue of an affidavit is prima facie evidence of the place where it was sworn to, and, in the absence of a venue or statement in the jurat as to where it was taken, it would contain no evidence that it was sworn to within the jurisdiction of the officer administering the oath, and, without evidence that it was taken by a proper officer within his jurisdiction, would be regarded as a nullity, unless the presumption would be that it was taken within his jurisdiction. But the omission does not invalidate the oath or render the affidavit a nullity when it is shown that it was duly administered by a proper officer within his jurisdiction, and the omission of the venue may be supplied by amendment. *Babcock v. Kuntzsch*, (1895) 85 Hun 33, 32 N. Y. S. 587. See also *Lambert v. People*, (1879) 76 N. Y. 220, 32 Am. Rep. 293, reversing 14 Hun 512; *People v. Snyder*, (1869) 41 N. Y. 397. Compare *Robinson v. Cooper*, (1909) 62 Misc. 517, 115 N. Y. S. 599, holding that where the venue recited shows lack of jurisdiction other evidence was not competent to show the authority of the notary.

Powers of commissioner of deeds in New York county.—A person appointed under the charter of the city of New York by its board of aldermen as a commissioner of deeds and who, within the statutory period prescribed, took, subscribed, and filed his oath in the office of the city clerk of the city and who thereafter filed a certificate of his appointment in the office of the clerk of the county of Kings and there took, subscribed, and filed in its county clerk's office the oath required by law, was held qualified to take oaths, affirmations, proofs, and acknowledgments in any of the boroughs of the city of New York, so that the registrar of Kings county could be compelled by mandamus to accept his certificate to the satisfaction of a mortgage. *People v. Haggerty*, (1898) 22 Misc. 296, 50 N. Y. S. 32.

Effect of relationship of parties.—An officer duly authorized to take acknowledgments is not disqualified to so act by reason of his relationship to the parties. *Remington Paper Co. v. O'Dougherty*, (1880) 81 N. Y. 474, modifying 16 Hun 594; *Lynch v. Livingston*, (1852) 6 N. Y. 422, affirming 8 Barb. 463.

§ 299. Acknowledgments and proofs in other states. The acknowledgment or proof of a conveyance of real property, within the state, may be made without the state, but within the United States, before any of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States.

2. A judge of the supreme, superior, or circuit court of a state.

3. A mayor of a city.

4. A commissioner appointed for the purpose by the governor of the state.

5. Any officer of the state or territory in which the acknowledgment is taken authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

6. Any officer of the District of Columbia authorized by the laws of the United States to take the acknowledgment or proof of deeds to be recorded in said district.

This section was derived from Real Property Law of 1896, § 249, as amended by L. 1903, ch. 419, § 1.

Requisites of acknowledgments: see *infra*, § 303.

When other authentication necessary: see *infra*, § 311.

Commissioners of deeds in other states and territories and foreign countries: see EXECUTIVE LAW, §§ 107, 108.

Oaths and affidavits taken without the state: see Code Civ. Pro., § 844.

Certificates not admissible in evidence.—Certificates of acknowledgment taken in a foreign state, in which the certificate of the notary fails to state that the person executing the instrument was "the individual described in and who executed the foregoing instrument," and the certificate of the foreign secretary of state fails to state that "he is well acquainted with the handwriting of such officer and verily believes that the signature to said certificate of proof or acknowledgment is genuine" or "that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same," are insufficient to permit the instrument to which they are attached to be read in evidence in the courts of this state. *Goddard v. Schmoll*, (1898) 24 Misc. 381, 53 N. Y. S. 402. See also *Johnston v. Granger*, (1896) 17 Misc. 54, 39 N. Y. S. 848.

Affidavit taken by notary public.—It was formerly held that an affidavit taken outside of the state by a notary public could not, as the law stood at that time, be read in our courts. *Turtle v. Turtle*, (1898) 31 App. Div. 49, 52 N. Y. S. 857. But since the amendment of this section by chapter 419 of the Laws of 1903, an affidavit or acknowledgment may be sworn to before a notary of another state, and if properly authenticated will be received in this state, provided such notary was authorized by law in his own state to take the acknowledgment or proof of deeds to be recorded therein. *Isman v. Wayburn*, (1907) 54 Misc. 86, 104 N. Y. S. 491; *Levy v. Levy*, (1899) 29 Misc. 374, 60 N. Y. S. 485.

§ 300. Acknowledgments and proofs in Porto Rico, the Philippines, Cuba, and elsewhere. If the party or parties executing such conveyance shall be or reside in Porto Rico, the Philippine Islands, Cuba, or in any other place over which the United

States of America at the time has or exercises sovereignty, control, or a protectorate, the same may be acknowledged or proved before:

1. A judge or clerk of a court of record thereof acting within his jurisdiction;

2. A mayor or other chief officer of a city, acting in such city;

3. A commissioner appointed for the purpose by the governor of this state and acting within his jurisdiction;

4. An officer of the United States regular army or volunteer service of the rank of captain or higher, or an officer of the United States navy of the rank of lieutenant or higher, while on duty at the place where such party or parties are or reside.

The certificate of an acknowledgment taken before any of the officers mentioned in subdivision one, two or three of this section, shall have attached thereto the seal of the court or officer if he have a seal, and if such officer have no seal, then a statement to that effect. The certificate of an acknowledgment taken before an officer of the army or navy mentioned in subdivision four of this section, shall state his rank, the name of the city, or other political division where taken, and the fact that he is on duty there, and shall be authenticated by the secretary of war or the secretary of the navy, as the case may be, of the United States.

This section was derived from Real Property Law of 1896, § 249a, as added by L. 1901, ch. 84, § 1, amended by L. 1906, ch. 398, § 1.

Commissioners of deeds in other states, territories and foreign countries: see EXECUTIVE LAW, §§ 107, 108.

Proof of acknowledgments taken in Philippine Islands.—Acknowledgments in the Philippine Islands of deeds to lands in this state may be proved by subscribing witnesses in any state or territory, or in a foreign country, before an officer authorized to take acknowledgments by this chapter. *Op. Atty.-Gen.* (1899) 266.

§ 301. Acknowledgments and proofs in foreign countries.

The acknowledgment, or proof, of a conveyance of real property situated within this state, may be made without the United States before any of the following officers:

1. An ambassador, a minister plenipotentiary, a minister extraordinary, a minister resident, or a charge d'affaires of the United States, accredited to the country, in which the acknowledgment or proof is taken, and residing therein.

2. A consul-general, a vice-consul-general, a deputy-consul-general, a consul, a vice-consul, a deputy-consul, a consular agent, a vice-consular agent, a commercial agent, or a vice-commercial agent of the United States, if residing within the country to which he is appointed, or a secretary of legation at the post, port, place or within the limits of his legation.

3. A commissioner appointed for the purpose by the governor, and acting within his own jurisdiction.

4. A person specially authorized for that purpose by a commission, under the seal of the supreme court of this state, issued to a reputable person residing in, or going to, the country where the acknowledgment or proof is to be taken.

5. If within the Dominion of Canada, it may also be made before any judge of a court of record; or before any officer of a province or territory of such Dominion authorized by the laws of such province or Dominion to take the acknowledgment or proof of deeds to be recorded therein.

6. If within the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, it may also be made before the mayor, the provost or other chief magistrate of a city or town therein, under his hand and the seal of such city or town.

7. All acts of ambassadors, ministers plenipotentiary, ministers extraordinary, ministers resident, *chargés d'affaires* and secretaries of legation, in taking the acknowledgment or proof of a conveyance of real property situated within this state, performed before April twenty-ninth, nineteen hundred and four, are hereby confirmed, provided that the certificate of acknowledgment or proof is in the form required by the laws of this state.

8. If within the states comprising the empire of Germany or within the kingdom of Italy, it may also be made before a judge of a court of record under the seal of such court, or before a notary public under the seal of his office and the seal of the city or town in which the notary resides.

9. If within the empire of Austria, kingdom of Hungary and kingdoms, states, territories and provinces comprising the monarchy of Austria-Hungary, it may also be made before a judge or clerk of a court of record under the seal of such court or before an imperial royal notary or royal notary under the seal of his offices and the seal of the city or town in which such notary resides.

10. If within the kingdom of Norway, Sweden or Denmark or if within any of their kingdoms, states, colonies, dependencies, territories, provinces, political subdivisions or dominions thereunto belonging, including Greenland and Iceland, it may be made before a judge or a clerk of a court of record therein under his hand and the seal of such court, or before the mayor or other chief magistrate of a city or town therein under his hand and the seal of such city or town, or before a notary public therein under his hand and the seal of his office and the seal of the city or town in which the notary resides, or before a sheriff therein, under his hand and the seal of the city or town in which the sheriff resides, or before a consul-general, a vice-consul-general, a deputy-consul-general, a consul, a vice-consul, a deputy-consul, a consular agent, a vice-consular agent, a commercial agent or a vice-commercial agent, of either Norway, Sweden or Denmark accredited to the place in which the acknowledgment or proof is taken, and residing

therein if under the hand and seal of his office or the seal of the consulate or legation to which he is attached.

This section was derived from Real Property Law of 1896, § 250, as amended by L. 1901, ch. 611, § 1; subds. 2 and 7, as amended by L. 1904, ch. 258, §§ 1, 2; subd. 6, as amended by L. 1903, ch. 98, § 1; subd. 8, as added by L. 1904, ch. 690, § 1. Subdivision 8 was amended by L. 1915, ch. 28, § 1, which added the words "or within the kingdom of Italy" following the words "empire of Germany." Subdivision 9 was added by L. 1912, ch. 70, § 1, and subd. 10 was added by L. 1916, ch. 395, § 1.

Commissioners of deeds in other states, territories and foreign countries: see EXECUTIVE LAW, §§ 107, 108.

Acts of vice-consul.—The acknowledgment of a document may properly be taken by a vice-consul, as when he acts in that capacity he is entitled to exercise the authority vested by law in the consul himself. *Brown v. Landon*, (1883) 30 Hun 57, affirmed without opinion (1885) 98 N. Y. 634.

Omission of seal under subdivision 8.—Where no "seal of the city or town in which the notary resides" appeared on a document executed in Germany, it was held that the document did not comply with the provisions of subdivision 8 of this section. *Matter of Kroog*, (1915) 89 Misc. 35, 152 N. Y. S. 553.

Residence of consul.—Where the venue was stated as "Confederation of Switzerland, Canton De Vaud, City of Vevey," and the recital was that "on this 28th day of May . . . before me, William Cuénod, Consular Agent of the United States of America, in and for the said City of Vevey, at said City of Vevey, personally appeared," etc., it was held that this established that the consular agent at the time he took the acknowledgment was in such city and performed an official act at that place, and necessarily imported residence, so that the certificate was in substantial compliance with the provisions of the statute. *Jordan v. Underhill*, (1904) 91 App. Div. 124, 86 N. Y. S. 620.

§ 302. Acknowledgments and proofs by married women.

The acknowledgment or proof of a conveyance of real property, within the state, or of any other written instrument, may be made by a married woman same as if unmarried.

This section was derived from Real Property Law of 1896, § 251.

Conveyances by married women: see DOMESTIC RELATIONS LAW, § 51 note.

Conveyance or partition between husband and wife: see DOMESTIC RELATIONS LAW, § 56.

Common-law rule.—At common law the deed and covenant of a married woman in reference to her real estate were absolutely void, and the only way in which she could convey was by uniting with her husband in levying a fine or suffering a common recovery. *Bradley v. Walker*, (1893) 138 N. Y. 291, 33 N. E. 1079, reversing 59 Super. Ct. 334, 14 N. Y. S. 315, 39 N. Y. St. Rep. 253; *Albany Fire Ins. Co. v. Bay*, (1850) 4 N. Y. 9, affirming 4 Barb. 407; *Jackson v. Vanderheyden*, (1819) 17 Johns. 167, 8 Am. Dec. 378; *Martin v. Dwelly*, (1830) 6 Wend. 9, 21 Am. Dec. 245.

Acknowledgment under Revised Statutes.—The Revised Statutes (1 R. S. 758, § 10) provided that "the acknowledgment of a married woman residing in this state to a conveyance purporting to be executed by her, shall not be taken unless in addition to the requisites contained in the preceding section she acknowledge, on a private examination apart from her husband, that she executed such conveyance freely and without any fear or compulsion of her husband; nor shall any estate of any such married woman pass by any conveyance not so acknowledged." The plain purpose of this provision of the statute was to protect a married woman against the coercion or improper influence of her husband, and to furnish evidence that she executed the deed subscribed by her freely and without any fear or compulsion of her husband. *Delafield v. Brady*, (1888) 108 N. Y. 524, 15 N. E. 428, affirming 38 Hun 404. But the statute of 1879 (L. 1879, ch. 249) removed the requirement of a separate acknowledgment by a married woman. That statute as amended

in 1880 provided as follows: "The acknowledgment by married women or the proof of the execution by married women of deeds and other written instruments may be made, taken and certified in the same manner as if they were sole; and all acts and parts of acts which require from them any other or different acknowledgments, proofs or certificates thereof are hereby repealed." See *Wronkow v. Oakley*, (1892) 64 Hun 217, 19 N. Y. S. 51, reversed on other grounds (1892) 133 N. Y. 505, 31 N. E. 521, 28 A. S. R. 661, 16 L. R. A. 209.

Deed executed after separation.—Where a decree of separation was had between husband and wife it was held that a deed executed by the latter in 1846 was effectual without a separate acknowledgment; the result of such decree being to take her out of the operation of the statute. *DeLafield v. Brady*, (1888) 108 N. Y. 524, 15 N. E. 428, affirming 38 Hun 404.

Appointment of husband as attorney in fact.—Under the Act of 1878 (L. 1878, ch. 300) authorizing a married woman "to execute, acknowledge and deliver her power of attorney with like force and effect and in the same manner as if she were a single woman," it was held that she might by such power appoint her husband her attorney in fact. *Wronkow v. Oakley*, (1892) 133 N. Y. 505, 31 N. E. 521, 28 A. S. R. 661, 16 L. R. A. 209, reversing 64 Hun 217, 19 N. Y. S. 51.

§ 303. Requisites of acknowledgments. An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.

This section was derived from Real Property Law of 1896, § 252.

By whom conveyance must be acknowledged or proved: see *supra*, § 292.

Acknowledgments and proofs in other states: see *supra*, § 299.

Acknowledgment by corporation: see *infra*, § 309.

Acknowledgments generally: see GENERAL CONSTRUCTION LAW, §§ 10, 11.

False certificates to certain instruments: see PENAL LAW, § 885.

Recording instruments without acknowledgment: see PENAL LAW, § 1862.

Object of acknowledgment.—The object of acknowledgment and record is to make titles secure and to prevent frauds in conveyancing, as well as to furnish proof of the due execution of conveyances. *Armstrong v. Combs*, (1897) 15 App. Div. 246, 44 N. Y. S. 171; *Jackson v. Schoonmaker*, (1809) 4 Johns. 161.

"Unless he knows or has satisfactory evidence."—This section does not prescribe either how the knowledge of the identity of the maker of the acknowledgment shall have been acquired by the officer, or that it must have existed for any definite period of time. *Wood v. Bach*, (1869) 51 Barb. 134. See also *Rexford v. Rexford*, (1872) 7 Lans. 6.

Identity of person executing instrument.—"The thing to be known is the identity of the person making the acknowledgment with the person described in the instrument and the person who executed the same. This knowledge must be possessed by the official." *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541; *Bidwell v. Sullivan*, (1897) 17 App. Div. 629, 45 N. Y. S. 530; *Matter of Kroog*, (1915) 89 Misc. 35, 152 N. Y. S. 553; *Moran v. Stader*, (1907) 52 Misc. 385, 103 N. Y. S. 175. And an officer is forbidden to take an acknowledgment unless he knows or has proof that the person making it is the person described in and who executed the instrument. *People v. Kempner*, (1900) 49 App. Div. 121, 63 N. Y. S. 199.

Particular applications.—A certificate of acknowledgment of a deed, which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it, is insufficient to entitle the deed to be recorded. *Fryer v. Rockefeller*, (1875) 63 N. Y. 268, affirming 4 Hun 800; *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541. Where a deed contained the names of the grantors properly spelled as "Schütz" with their correct Christian names and it was undisputed that they signed the same, it was held that the title was not rendered unmarketable because the names of the grantors were spelled "Schultz" in the certificate of acknowledgment. *Veit v. Schwob*, (1908) 127 App. Div.

171, 111 N. Y. S. 286. Where a certificate of acknowledgment to a deed stated that the identity of the person acknowledging was proved to the officer by a witness named, who, being sworn, stated his place of residence and that he knew the persons proposing to acknowledge to be the identical ones described in and who executed the deed, it was held that the acknowledgment was sufficient within the recording act, that it was not necessary to state in the certificate that the officer had satisfactory evidence of the identity of the person acknowledging, and that the facts stated did show that he had such evidence. *Ritter v. Worth*, (1874) 58 N. Y. 627, reversing 1 *Thomp. & C.* 406. See also *West Point Iron Co. v. Reymert*, (1871) 45 N. Y. 703. Where on the same paper, and following the signatures to an assignment for the benefit of creditors, was written a notary's certificate of acknowledgment bearing the same date as the assignment, naming as the persons acknowledging the ones who apparently executed the assignment, and stating that the persons named were known to the notary "to be the individuals described in and who executed the same," it was held that the words "the same" referred to the instrument to which the certificate was appended and sufficiently identified it, and that the certificate showed a due acknowledgment of the instrument. *Smith v. Boyd*, (1886) 101 N. Y. 472, 5 N. E. 319, reversing 10 *Daly* 149.

Deed executed in another state.—A deed of assignment executed in another state is inadmissible in evidence where the certificate of acknowledgment fails to state that the officer taking it knew or had satisfactory evidence that the person making the acknowledgment was the individual described in and who executed the instrument. *Johnston v. Granger*, (1896) 17 *Misc.* 54, 39 N. Y. S. 848. See also *Goddard v. Schmoll*, (1898) 24 *Misc.* 381, 53 N. Y. S. 402.

Duty of county clerk as to acknowledgment or proof of execution.—It is the clerk's duty to see that the proof of execution or acknowledgment complies with and contains all of the requirements of the statute; and when it fulfills such requirements he has no discretion in the matter but must record the instrument in the manner provided by statute. The acknowledging officer is to be satisfied of the facts to which he certifies, and no proof other than a proper certificate of such officer can be required by the clerk. He is made the judge of the sufficiency of the certificate and of whether it complies with the requirements of the statute, but the proof and the facts required are for the acknowledging officer to ascertain and certify, and it is the evidence to the clerk which the statute requires before he can be compelled to record an instrument. The clerk assumes no liability when he records an instrument acknowledged in the mode prescribed by the statute, but the person who takes the acknowledgment is made liable for a false or fraudulent certificate. *Matter of Wadsworth*, (1899) 27 *Misc.* 264, 57 N. Y. S. 911.

§ 304. Proof by subscribing witness. When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

This section was derived from Real Property Law of 1896, § 253.

Proof when witnesses are dead: see *infra*, § 314.

Proof of written instruments where there are subscribing witnesses: see *Code Civ. Proc.*, § 961b.

Proof of instrument by submitting disputed and genuine handwriting: see *Code Civ. Proc.*, § 961d.

Acknowledgment and proof of instruments: see *GENERAL CONSTRUCTION LAW*, § 11.

Subscribing witness defined.—In *Hollenback v. Fleming*, (1844) 6 *Hill* 303, a subscribing witness was defined to be one who was present when the instrument was executed and who at that time subscribed his name to it as

a witness of the execution. A person who was present at the execution of an instrument, but who did not subscribe it at that time, but did so afterwards without the request of the person executing the instrument, was held not to be an attesting witness. See also *Earley v. St. Patrick's Church Soc.*, (1894) 81 Hun 369, 30 N. Y. S. 979.

Necessity of witness being present at moment of execution.—The witness need not be present at the moment of execution. If he is called in by the parties immediately afterwards and told that the instrument is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. The execution by the parties and the subscribing by the witness are then considered as parts of the same transaction. *Hollenback v. Fleming*, (1844) 6 Hill 303.

"His own place of residence."—The imperative language of the statute respecting the residence of subscribing witnesses, as well as its plain object, would seem to preclude the court from considering its requirements as either directory or immaterial. It was plainly intended to remedy defects in the pre-existing law which experience had shown to be dangerous. Proof of a conveyance by a subscribing witness, being liable to be rebutted by evidence that he was interested or incompetent, it became important that parties interested should have some means of identifying the witness aside from his mere name, which in many cases would be misleading and unreliable. *Irving v. Campbell*, (1890) 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620, reversing 56 Super. Ct. 224. The law requiring a subscribing witness to state the place of his residence was first introduced in the Revised Statutes, which took effect January 1, 1830 (1 R. S. 758, § 12), *Canandaigua Academy v. McKechnie*, (1882) 90 N. Y. 618.

Discrepancy in dates.—Where, in a deed the execution of which is proved by the subscribing witness, there is a discrepancy of one day between the date of the deed and the date under the signature of the subscribing witness, such discrepancy does not justify the rejection of the title. *Bowers v. Duryea*, (1908) 58 Misc. 525, 109 N. Y. S. 756.

Proof of certificate of incorporation by subscribing witness.—The attorney-general has ruled that the secretary of state is not authorized to file the certificate of incorporation of a business corporation where the execution of it by the incorporators is proved by a subscribing witness and not by acknowledgment. *Op. Atty.-Gen.* (1911) 651. See *BUSINESS CORPORATIONS LAW*, § 2 note.

When unnecessary to call subscribing witness. When a deed has been duly acknowledged, although there was a subscribing witness, it is not necessary to call such witness for the purpose of proving its execution. *Simmons v. Havens*, (1886) 101 N. Y. 427, 5 N. E. 73, affirming 29 Hun 119. But see *Borst v. Empeie*, (1851) 5 N. Y. 33.

§ 305. **Compelling witnesses to testify.** On the application of a grantee in a conveyance, his heir or personal representative, or a person claiming under either of them, verified by the oath of the applicant, stating that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpoena, requiring such witness to attend and testify before him concerning the execution of the conveyance. A person who, on being duly served with such a subpoena, without reasonable cause refuses or neglects to attend or refuses to answer under oath concerning the execution of such conveyance, forfeits to the person injured one hundred dollars; and may also be committed to prison by the officer who issued the subpoena, there to remain without bail, and without the liberties

of the jail, until he answers under oath as required by this section.

This section was derived from Real Property Law of 1896, § 254.

When witness not excused from testifying: see Code Civ. Pro., § 837.

Perjury generally: see PENAL LAW, § 1620 et seq.

When witness cannot be compelled to testify.—It has been held that one who did not hold or claim title under a grantee could not compel a subscribing witness to make proof of a deed. *Tuttle v. People*, (1867) 36 N. Y. 431.

Perjury of attesting witness.—The false swearing to the execution of a deed by a subscribing witness is perjury. *Tuttle v. People*, (1867) 36 N. Y. 431.

§ 306. Certificate of acknowledgment or proof. An officer taking the acknowledgment or proof of a conveyance must indorse thereupon or attach thereto, a certificate, signed by himself, stating all the matters required to be done, known, or proved on the taking of such acknowledgment or proof; together with the name and substance of the testimony of each witness examined before him, and if a subscribing witness, his place of residence.

Any conveyance which has heretofore been recorded, or which may hereafter be recorded, shall be deemed to have been duly acknowledged or proved and properly authenticated, when thirty years have elapsed since such recording; saying, however, the rights of every purchaser in good faith and for a valuable consideration deriving title from the same vendor or grantor, his heirs or devisees, to the same property or any portion thereof, whose conveyance shall have been duly recorded before the said period of thirty years shall have elapsed or before September first, nineteen hundred and five.

This section was derived from Real Property Law of 1896, § 255, as amended by L. 1905, ch. 450, § 1.

By whom conveyance must be acknowledged or proved: see *supra*, § 292.

Requisites of acknowledgments: see *supra*, § 303.

Proof by subscribing witness: see *supra*, § 304.

Contents of certificate: see *infra*, § 312.

Acknowledgment by corporation and form of certificate: see *infra*, § 309.

What instruments may be acknowledged: see Code Civ. Pro., § 937.

Acknowledgment and proof of instruments: see GENERAL CONSTRUCTION LAW, § 11.

False certificate of acknowledgment: see PENAL LAW, § 885.

Neglecting to make transcripts or making false certificates: see PENAL LAW, § 1874.

When conveyance is evidence: see Code Civ. Pro., § 935.

Certificate generally.—The final act in the proper execution of an instrument is "the including in a certificate a statement of the things done and the knowledge possessed. This certificate must embrace both acts and knowledge. This act is the act of the official." *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541. See also *Matter of Kroog*, (1915) 89 Misc. 35, 152 N. Y. S. 553. And while it has often been held that the precise form of certificate prescribed by statute need not be followed, it is essential that the statute be substantially complied with. *Smith v. Guarantee Dental Co.*, (1909) 114 N. Y. S. 867. And a material provision of the statute expressly required to be stated in a certificate of acknowledgment cannot be wholly disregarded, and a deed thus acknowledged admitted to record. *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541. See also *Irving v.*

Campbell, (1890) 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620, reversing 56 Super. Ct. 224.

Purpose of acknowledgment and record.—The object and purpose of acknowledgment and record is to make the title secure and prevent frauds in conveyancing, as well as to furnish proof of the due execution of conveyances. *Armstrong v. Combs*, (1897) 15 App. Div. 246, 44 N. Y. S. 171. And an instrument is not duly acknowledged unless there is not only the oral acknowledgment but the written certificate also. *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 159, 35 N. Y. S. 17.

Proof of conveyance.—A conveyance of lands can be proved only by the acknowledgment to a public officer of its execution by the person making it, or by the affidavit of a subscribing witness having a place of residence, which must be stated to the officer taking the proof, and inserted by him in the certificate required to be made and indorsed on the conveyance. *Irving v. Campbell*, (1890) 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620, reversing 56 Super. Ct. 224. The fact that an instrument was recorded is of no avail if it was not entitled to be recorded, as the record under such circumstances is not evidence of the due execution thereof. *Bradley v. Walker*, (1893) 138 N. Y. 291, 33 N. E. 1079, reversing 59 Super. Ct. 334, 14 N. Y. S. 315, 39 N. Y. St. Rep. 253; *Fryer v. Rockefeller*, (1875) 63 N. Y. 268, affirming 4 Hun 800; *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541.

Effect of reacknowledgment.—A party to a deed of lands cannot impeach it at law, on the ground of fraud as to the consideration. The rule is otherwise where the fraud relates to the execution; but if a conveyance, originally void on account of fraud, is subsequently acknowledged by the grantor before a proper officer and left with the grantee, this has been held to be equivalent to a redelivery and to give it effect from that time. *Osterhout v. Shoemaker*, (1842) 3 Hill 513.

Cited.—This section was cited in *People v. Kempner*, (1909) 49 App. Div. 121, 63 N. Y. S. 199.

§ 307. When certificate to state time and place. When the acknowledgment or proof is taken by a commissioner appointed by the governor, for a city or county within the United States, and without the state, the certificate must also state the day on which, and the town and county or the city in which the same was taken.

This section was derived from Real Property Law of 1896, § 256.

Cited.—This section was cited in *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 159, 35 N. Y. S. 17.

§ 308. When certificate must be under seal. When a certificate of acknowledgment or proof is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by an ambassador, a minister, a chargé d'affaires, a consul-general, a vice-consul-general, a deputy-consul-general, a consul, a vice-consul or a deputy-consul, a consular or a vice-consular agent, a commercial or a vice-commercial agent, or a secretary of legation, of the United States, it must be under his seal of office, or the seal of the consulate or legation to which he is attached.

All acknowledgments or proofs of deeds, mortgages or other instruments relating to real property, the certificates of which were made in the form required by the laws of this state, by a consul-general, a vice-consul-general, a deputy-consul-general, a consul, a vice-consul, a deputy-consul, a consular agent, a vice-consular agent, a commercial agent, a vice-commercial agent, or a

secretary of legation of the United States prior to April twenty-ninth, nineteen hundred and four, are confirmed, but nothing herein contained shall effect any action or proceeding now pending in any court.

This section was derived from Real Property Law of 1896, § 257, as amended by L. 1904, ch. 528, § 3.

Certificate to be recorded: see *infra*, § 318.

Cited.—This section was cited in *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 159, 35 N. Y. S. 17.

§ 309. Acknowledgment by corporation and form of certificate. The acknowledgment of a conveyance or other instrument by a corporation, must be made by some officer thereof authorized to execute the same by the board of directors of said corporation. The certificate of acknowledgment must be in substantially the following form, the blanks being properly filled.

State of New York, } ss.:
County of....., }

On the day of in the year, before me personally came to me known, who, being by me duly sworn, did depose and say that he resides in; that he is the (president or other officer) of the (name of corporation), the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Signature and office of officer taking acknowledgment.)

If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.

This section was derived from Real Property Law of 1896, § 258.

Seal of corporation and private seal as corporate seal: see GENERAL CONSTRUCTION LAW, §§ 43, 45.

Origin of certificate.—The form of certificate prescribed by this section seems to be simply an adoption of the form which had been in general use for many years and approved by numerous decisions. *Rogers v. Pell*, (1900) 47 App. Div. 240, 62 N. Y. S. 92, affirmed without opinion (1901) 168 N. Y. 587, 60 N. E. 112; *Pruyne v. Adams Furniture, etc., Co.*, (1895) 92 Hun 214, 36 N. Y. S. 361, affirmed without opinion (1898) 155 N. Y. 629, 49 N. E. 1103.

Tendency of courts to uphold certificates.—The tendency of the courts is to uphold the certificate of a corporate officer when the substance is present. *Rogers v. Pell*, (1900) 47 App. Div. 240, 62 N. Y. S. 92, affirmed without opinion (1901) 168 N. Y. 587, 60 N. E. 1112. See also *Smith v. Boyd*, (1886) 101 N. Y. 472, 5 N. E. 319, reversing 10 Daly 149; *Pruyne v. Adams Furniture, etc., Co.*, (1895) 92 Hun 214, 36 N. Y. S. 361, affirmed without opinion (1898) 155 N. Y. 629, 49 N. E. 1103.

Proof as to corporate seal.—In *Lovett v. Steam Saw Mill Assn.*, (1836) 6 Paige 54, it was held that the officer or agent of a corporation, who executes a deed in the name of the corporation by affixing to the instrument the impression of the corporate seal intrusted to his care, is the party executing the deed; that he also stands in the character of a subscribing witness, and may be examined to prove that the seal affixed by him is the common seal

of the corporation; that the seal thus affixed is of itself prima facie evidence that it was so affixed by order of the corporation. *Canandarqua Academy v. McKechnie*, (1882) 90 N. Y. 618, affirming 19 Hun 62. See also *Rogers v. Pell*, (1900) 47 App. Div. 240, 62 N. Y. S. 92, affirmed without opinion (1901) 168 N. Y. 587, 60 N. E. 1112.

Venue of acknowledgment as question of fact.—Where the venue of an official certificate of acknowledgment of a general assignment made by a foreign corporation names one state and the testimony of an interested witness names another state as the place where the acknowledgment was taken, a question of fact is raised as to the jurisdiction of the certifying officer. *Rogers v. Pell*, (1898) 154 N. Y. 518, 49 N. E. 75, reversing 89 Hun 153, 35 N. Y. S. 17.

§ 310.¹ A certificate of acknowledgment or proof, made within the state, by a commissioner of deeds, justice of the peace, or, except as otherwise provided by law, by a notary public, does not entitle the conveyance to be read in evidence or recorded, except within the county in which the officer making the same is authorized to act² at the time of making such certificate, unless authenticated by a certificate of the clerk of the same county; provided, however, that all certificates of acknowledgments or proof, made by or before a commissioner of deeds of the city of New York residing in any part therein shall be authenticated by the³ clerk of any county within said city, in whose office such commissioner of deeds shall have filed a certificate under the hand and seal of the city clerk of said city, showing the appointment and term of office of such commissioner,⁴ and no other certificate shall be required, from any other officer to entitle said conveyance to be read in evidence or recorded in any county⁵ of the state of New York. But this section does not apply to a conveyance executed by an agent for the Holland Land Company or of the Pulteney estate, lawfully authorized to convey real property.

This section was derived from Real Property Law of 1896, § 259, as amended by L. 1899, ch. 147, § 1. It was amended by L. 1911, ch. 196, § 1. The amendments are shown in the footnotes.

Authentication to be recorded: see *infra*, § 318.

Certified copies may be recorded: see *supra*, § 297.

False certificate of acknowledgment or proof: see PENAL LAW, § 885.

Conveyance when acknowledged, proved, or recorded as evidence: see Code Civ. Pro., § 935.

Proof according to rules of common law: see Code Civ. Pro., § 962.

Form of certificate to copies: see Code Civ. Pro., § 957 et seq.

Acknowledgment or proof of instrument: see GENERAL CONSTRUCTION LAW, § 11.

Necessity of authentication where instrument is recorded outside of notary's county.—Under this section a certificate of acknowledgment cannot be

¹ Section heading amended out.

² Words "making the same is authorized to act" substituted for word "resides."

³ Words "city clerk of said city, that the said commissioner of deeds was duly appointed and qualified as such," omitted.

⁴ Words "clerk of any county within said city . . . of such commissioner," new.

⁵ Words "or part of a county, situated within the limits, confines or boundaries, of the said city of New York," omitted. Words "of the state of New York," new.

recorded outside the county where the notary is authorized to act unless his authority is authenticated as provided. *Op. Atty.-Gen.* (1912) 389.

Authentication of certificate of incorporation.—A certificate of incorporation presented for record in the office of the clerk of a county, should not be recorded in such county without a certificate of the clerk of the county, where the acknowledgments of the incorporators were taken, showing authority of notary public to take such acknowledgments. *Op. Atty.-Gen.* (1911) 26.

Holland Land Company.—For a brief history of the Holland Land Company, see *Seneca Nation of Indians v. Appleby*, (1908) 127 App. Div. 770, 112 N. Y. S. 177, reversed (1909) 196 N. Y. 318, 89 N. E. 835; *Bissing v. Smith*, (1895) 85 Hun 564, 33 N. Y. S. 123.

Pulteney estate.—For a general history of the Pulteney estate and its legal status, see *Howard v. Moot*, (1876) 64 N. Y. 262, affirming 2 Hun 475, 5 Thomp. & C. 89; *People v. Snyder*, (1869) 41 N. Y. 397, affirming 61 Barb. 589.

§ 311. When other authentication necessary. In the following cases a certificate of acknowledgment or proof is not entitled to be read in evidence or recorded unless authenticated by certificates¹ by the following officers, respectively:

1. Where the original certificate of acknowledgment or proof is made by a commissioner appointed by the governor, by the secretary of state.

2. Where made by a judge of a court of record in Canada, by the clerk of the court.

3. Where made by the officer of a state of the United States, or of any province or territory of the Dominion of Canada, authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, by the secretary of state of the state, the provincial secretary, deputy provincial secretary or assistant provincial secretary of the province, or commissioner of the territory of the Dominion of Canada, or by the clerk, register, recorder or prothonotary of a county, city or parish in which the ²certificate purports to be made, or by the clerk of any court in or of such state or dominion, county, city or parish having by law a seal. The word county shall be deemed to apply to and include the District of Columbia for the purpose of this section. All ³certificates authenticating such acknowledgments or proofs of deeds, mortgages or other instruments relating to real property ⁴heretofore made by any of the officers above referred to are confirmed, saving, however, the rights of purchasers in good faith and for a valuable consideration whose conveyance shall have been duly recorded ⁵before this act shall take effect; this act shall not affect any action or legal proceeding ⁶now pending.

¹ Words "by certificates" new.

² "Certificate purports to be made" new; "officer making the original certificate resided when the certificate was made, or in which such acknowledgment or proof was taken" omitted.

³ "Certificates authenticating such" new.

⁴ "Heretofore made" in place of "authenticated prior to April 16, 1908."

⁵ "Before this act shall take effect" in place of "prior to said date."

⁶ "Now pending" in place of "pending on said date."

4. All acts of the secretary of state of any state or territory of the United States in authenticating a certificate of acknowledgment or proof of a conveyance of real property within the state, performed before October first, eighteen hundred and ninety-six, are hereby confirmed, provided that the said certificate of authentication is in the form required by the laws of this state.

This section was derived from Real Property Law of 1896, § 260. Subdivision 3 as amended by L. 1907, ch. 633, § 1; subd. 4 as added by L. 1905, ch. 329, § 1. It was amended by L. 1913, ch. 209, § 1. The amendments are shown in the footnotes.

Certificate to be recorded: see *infra*, § 318.

Failure to attach certificate of secretary of state.—Where a notice of mechanic's lien was verified in Milwaukee, Wisconsin, before a commissioner for the state of New York, and filed in the New York county clerk's office without having attached thereto the certificate of the secretary of state that the person taking the verification was a commissioner for the state of New York, and after the commencement of an action to foreclose the lien it was taken from the files of the county clerk's office and the certificate attached, it was held that the notice was insufficient to create a lien. *Cream City Furniture Co. v. Squier*, (1893) 2 Misc. 438, 21 N. Y. S. 972.

When certificate must be signed by secretary of state.—The certificate must be signed by the secretary of state personally, except in the case of absence or inability to act, or vacancy in said office, when the same should be signed by the official entitled under the law to perform the duties of the secretary during such inability, absence, or vacancy in said office. *Op. Atty.-Gen.* (1901) 259.

§ 312. Contents of certificate of authentication. An officer authenticating a certificate of acknowledgment or proof must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer; and that he verily believes the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office, and that he verily believes the impression of the seal upon the original certificate is genuine. A clerk's certificate authenticating a certificate of acknowledgment or proof, taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge before whom the acknowledgment or proof was taken, was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk

thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature is genuine.

This section was derived from Real Property Law of 1896, § 261.

Certificate to be recorded: see *infra*, § 318.

Notary's certificate as evidence: see Code Civ. Pro., § 923.

False certificates and neglecting to make transcripts: see PENAL LAW, §§ 1861, 1874.

Recording instruments without acknowledgment: see PENAL LAW, § 1862.

Certificate of foreign county clerk.—It is not to be presumed that the county clerk of a county outside of the state is to certify that, by the laws of the state of New York, an officer of his state was authorized to take acknowledgments, but he may specify enough to warrant the court here in determining that he had the authority, which must be derived from the laws of this state. *Matter of Wilcox*, (1892) 1 Misc. 55, 21 N. Y. S. 780.

Defective certificates.—Where, certificates of acknowledgment taken in a foreign state fail to state that the person executing the instrument was "the individual described in and who executed the foregoing instrument," and the foreign secretary of state fails to certify that "he is well acquainted with the handwriting of such officer and verily believes that the signature to said certificate of proof or acknowledgment is genuine" or "that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same," the certificates are insufficient to permit the instrument to which they are attached to be read in evidence in the courts of this state. *Goddard v. Schmoll*, (1898) 24 Misc. 381, 53 N. Y. S. 402. See also *Williamson v. Banning*, (1895) 86 Hun 203, 33 N. Y. S. 259; *Ross v. Wigg*, (1884) 34 Hun 192. And where a certificate was executed by the clerk of a court, who, instead of certifying in accordance with the statute that he is well acquainted with the handwriting of the notary and verily believes his signature to the acknowledgment is genuine, merely certifies that said notary is "duly commissioned and qualified, and that full faith and credit are due to all his acts as such," it was held that such certificate was defective. *Freedman v. Oppenheim*, (1903) 80 App. Div. 487, 81 N. Y. S. 110.

Omission of date.—The absence of a date will not vitiate a certificate, as the statute does not require it to be dated. *Thorn v. Mayer*, (1895) 12 Misc. 487, 33 N. Y. S. 664.

Lack of seal on the record.—The fact that the record does not show that a seal was attached to the county clerk's certificate does not vitiate the record, where the certificate contains a recital that he affixed such seal and there is no affirmative evidence that such recital is not true, as it will be presumed that the clerk performed the duty required of him by law. *Thorn v. Mayer*, (1895) 12 Misc. 487, 33 N. Y. S. 664.

Omission to state name and official character.—An omission in a county clerk's certificate of the name of the person who took an acknowledgment and his official character is not a fatal defect, as such omission can be supplied from the certificate of acknowledgment. *Thorn v. Mayer*, (1895) 12 Misc. 487, 33 N. Y. S. 664.

Proof of conveyance.—A conveyance of lands may be proved only by the acknowledgment to a public officer of its execution by the person making it, or by the affidavit of a subscribing witness having a place of residence, which must be stated to the officer taking the proof, and inserted by him in the certificate required to be made and indorsed on the conveyance. *Irving v. Campbell*, (1890) 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620, reversing 56 Super. Ct. 224.

Cited.—This section was cited in *Newman v. Lee*, (1903) 87 App. Div. 116, 84 N. Y. S. 106; *Op. Atty.-Gen.* (1901) 259.

§ 313. Recording of conveyances acknowledged or proved without the state, when parties and certifying officer are dead. When the execution of a conveyance of real property within this state is acknowledged or proved according to the laws of any other state of the United States, and a certificate of the

acknowledgment or proof signed by the officer taking it is annexed to or indorsed upon the instrument, if such officer and the grantor or mortgagor be dead and the death of all of them be proved by affidavit, sworn to in such state before an officer authorized by its laws to administer an oath therein, the conveyance, with the affidavit or affidavits annexed thereto, on being authenticated as required by this section, may be read in evidence and recorded in the same manner, and with like effect, as if the conveyance was acknowledged or proved and certified as required by the laws of this state. To entitle such conveyance and affidavits to be read in evidence, or recorded, a certificate of the clerk, recorder, register or prothonotary of the county in which the deceased officer resided, authenticating his signature, and also certifying that the conveyance is acknowledged or proved in all respects, as required by the laws of such state, must be annexed to the original certificate; and a like certificate of such clerk, recorder, register or prothonotary, authenticating the signature of the officer, before whom the affidavits proving the deaths were taken, must be annexed to such affidavits. The affidavits on being recorded, are presumptive evidence of the matters of fact, required to be stated therein.

This section was derived from Real Property Law of 1896, § 262.

Conveyance of land without the state as evidence: see Code Civ. Pro., §§ 946, 947.

Form of certificate to copies: see Code Civ. Pro., § 957 et seq.

Proof of instrument by submitting disputed and genuine handwriting: see Code Civ. Pro., § 961d.

Proof under rules of common law: see Code Civ. Pro., § 962.

Presumption of death in certain cases: see Code Civ. Pro., § 841.

§ 314. Proof when witnesses are dead. When the witnesses to a conveyance, authorized to be recorded, are dead, its execution may be proved before any officer authorized to take within the state the acknowledgment and proof of conveyances, other than a commissioners of deeds, a notary public, or a justice of the peace. The proof of the execution must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor, which evidence, with the name and residence of each witness examined, must be set forth by the officer taking the same, in his certificate of proof. A conveyance so proved, and certified, may be recorded in the proper office, if the original conveyance be at the same time deposited in the same office, there to remain for the inspection of all persons desiring to examine the same. If the conveyance affects real property in two or more counties, a certified copy of the conveyance, with the proof and certificates, may be recorded in each of such counties. Such recording and deposit are constructive notice of the execution of such conveyance to all purchasers of the same real property, or any part

thereof, from the same vendor, his heirs or assigns, subsequent to such recording, but do not entitle the conveyance or the record thereof, or a transcript of the record, to be read in evidence.

This section was derived from Real Property Law of 1896, § 263.

Proof by subscribing witness: see *supra*, § 304.

Proof of written instrument where there are subscribing witnesses: see Code Civ. Pro., § 961b.

Proof of instrument by disputed and genuine handwriting: see Code Civ. Pro., § 961d.

Proof under rules of common law: see Code Civ. Pro., § 962.

Notary's certificate as evidence: see Code Civ. Pro., § 923.

Presumption of death in certain cases: see Code Civ. Pro., § 841.

Record of conveyance as evidence and rebuttal thereof: see Code Civ. Pro., §§ 935, 936.

Proof where deed has not been acknowledged.—The early rule was that where a deed was not acknowledged and certified so as to entitle it to be recorded or used as evidence, it might still be proved in the common-law method by calling the subscribing witness or by any secondary evidence which the rules of law permitted. *Borst v. Empie*, (1851) 5 N. Y. 33.

Proof where deed raises suspicion of fraud.—Proof of the handwriting of deceased subscribing witnesses to a deed is not sufficient evidence of its execution to entitle it to be read to the jury, where the deed on its face excites suspicion of fraud. The party producing it must, in such case, in addition to proving the handwriting of the subscribing witnesses, give evidence explaining the suspicious circumstances or proving the identity of the grantor. *Brown v. Kimball*, (1840) 25 Wend. 259, reversing 19 Wend. 437.

§ 315. Recording books. Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

This section was derived from Real Property Law of 1896, § 264.

Certain deeds deemed mortgages: see *infra*, § 320.

Duty of county clerk to provide books for recording all papers authorized by law to be recorded: see COUNTY LAW, § 161.

Docket books of judgments: see Code Civ. Pro., § 1245 et seq.

Notice of lis pendens to be recorded and indexed: see Code Civ. Pro., § 1672.

Filing notice of mechanic's lien: see LIEN LAW, §§ 10, 12.

Record of conveyance as evidence: see Code Civ. Pro., § 935.

Books to be kept by surrogate: see Code Civ. Pro., § 2486.

Falsely certifying as to record of deeds and instruments: see PENAL LAW, § 1860.

Recording tax on mortgages: see TAX LAW, § 250 et seq.

What instruments are entitled to record.—It is only to an instrument in writing, by which an estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to real estate may be affected in law or equity, that the provisions of our recording statutes have any application, and if the conveyance does not affect any interest in the real estate, or the title thereto, in law or equity, no benefit is to be derived from the record. *Gellig v. Maass*, (1863) 28 N. Y. 191; *Bank for Savings v. Frank*, (1879) 45 Super. Ct. 404.

"Delivered to him."—An instrument is deemed recorded when delivered to the county clerk, and his neglect to perform his official duties does not

render an instrument so delivered an unrecorded instrument. *Manhattan Co. v. Laimbeer*, (1888) 108 N. Y. 578, 15 N. E. 712, reversing 53 Super. Ct. 22; *Putnam v. Stewart*, (1884) 97 N. Y. 411; *Mutual Life Ins. Co. v. Dake*, (1881) 87 N. Y. 257; *Reid v. Long Lake*, (1904) 44 Misc. 370, 89 N. Y. S. 993.

Erroneous record.—A mistake in recording or copying an instrument on the record is not conclusive against the party injured thereby, and he may show such mistake. *Simonson v. Falihee*, (1881) 25 Hun 570; *Wilsey v. Dennis*, (1864) 44 Barb. 354. See also *Muehlberger v. Schilling*, (1888) 3 N. Y. S. 705, 19 N. Y. St. Rep. 1.

§ 316. **Indexes.** Each recording officer must provide, at the expense of his county, proper books for making general indexes of instruments recorded in his office, and must form indexes therein, so as to afford correct and easy reference to the books of record in his office. There must be one set of indexes for mortgages or securities in the nature of mortgages, and another set for conveyances and other instruments not intended as such mortgages or securities. Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees, and the other list consisting of the names of the grantees or mortgagees, followed by the names of their grantors or mortgagors, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record. This section, so far as relates to the preparation of new indexes, shall not apply to a county where the recording officer now has general numerical indexes. A recording officer who records a conveyance of real property, sold by virtue of an execution, or by a sheriff, referee or other person, pursuant to a judgment, the granting clause whereof states whose right, title or interest was sold, must insert in the proper index, under the head "grantors," the name of the officer executing the conveyance, and of each person whose right, title or interest is so stated to have been sold.

This section was derived from Real Property Law of 1896, § 265

Indexing instruments affecting real property in New York city: see *infra*, § 328.

County records: see COUNTY LAW, § 26.

County clerk to index orders appointing receivers: see Code Civ. Pro., § 2470.

County clerk to index notices of mortgage foreclosure by advertisement: see Code Civ. Pro., § 2390.

Indexes to be kept by surrogate: see Code Civ. Pro., § 2487.

Failure to index instrument.—The indexing of an instrument is no part of the record thereof, and the failure of a county clerk to index a mortgage in the proper book does not deprive the mortgagee of the right of priority given him by the recording acts. *Mutual Life Ins. Co. v. Dake*, (1881) 87 N. Y. 257.

Improper recording.—Recording an instrument in the wrong book, such as recording an assignment of an interest to secure a debt in a book of deeds instead of a book of mortgages, has been held to be ineffectual to charge a bona fide purchaser or incumbrancer with constructive notice. *Howells v. Hettrick*, (1897) 13 App. Div. 366, 43 N. Y. S. 183, affirmed (1899) 160 N. Y. 308, 54 N. E. 677.

"At the expense of his county."—The attorney-general has ruled, in a matter where it was claimed that the words "at the expense of his county" referred not only to the providing of the books but also to the making of the indexes, that such construction is not authorized, and that the intent of the statute is that the books shall be provided at the expense of the county and the county clerk must thereafter form indexes therein. *Op. Atty-Gen.* (1910) 470.

Power of supervisors to make contract for reindexing records.—Unless authorized by special statute, a board of supervisors has no power to make a contract to pay a county clerk for reindexing instruments recorded in his office. *Wadsworth v. Livingston County*, (1916) 217 N. Y. 484, 112 N. E. 161, reversing 159 App. Div. 934, 144 N. Y. S. 1149. See also *People v. Howard*, (1912) 152 App. Div. 621, 137 N. Y. S. 496. See *COUNTY LAW*, § 161 note. Nor has a board of supervisors power to change the method of indexing prescribed by statute, or to transfer the duty of making the indexes from the county clerk to any other person. *People v. Nash*, (1875) 62 N. Y. 484, affirming 3 Hun 535. See also *Wile v. Wilson*, (1883) 93 N. Y. 255.

§ 317. Order of recording. Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery.

This section was derived from Real Property Law of 1896, § 266.

Recording of conveyances: see *supra*, § 291.

Effect of delivery to county clerk.—An instrument is in law recorded when it is delivered to the county clerk for that purpose, and a neglect by him to perform his official duties or abstracting the paper from the files or records of his office does not render it an unrecorded instrument. *Manhattan Co. v. Laimbeer*, (1888) 108 N. Y. 578, 15 N. E. 712, reversing 53 Super. Ct. 22; *Mutual Life Ins. Co. v. Dake*, (1881) 87 N. Y. 257; *Reid v. Long Lake*, (1904) 44 Misc. 370, 89 N. Y. S. 993. And after such delivery "nothing more need be done to keep the record perfect, except at the proper time to record it in its proper order in the proper book; and yet if the conveyance in the meantime, before the record thereof should be mislaid in the clerk's office, or lost or purloined, the record would still remain complete." *Mutual Life Ins. Co. v. Dake*, (1881) 87 N. Y. 257. See also *Bedford v. Tupper*, (1883) 30 Hun 174; *Simonson v. Falihee*, (1881) 25 Hun 570.

§ 318. Certificate to be recorded. The certificate of the acknowledgment or proof of the execution of an instrument, and the certificate authenticating the signature or seal of the officer so certifying, or both, if required, must be recorded together with the instrument so acknowledged or proved; otherwise neither the record of the instrument nor a transcript thereof can be read in evidence.

This section was derived from Real Property Law of 1896, § 267.

When county clerk's authentication necessary: see *supra*, § 310.

Contents of certificate: see *supra*, § 312.

Form of certificate to copies: see Code Civ. Pro., § 957 et seq.

Notary's certificate as evidence: see Code Civ. Pro., § 923.

§ 319. Time of recording. The recording officer must make an entry in the record, immediately after the copy of every instrument recorded by him, stating the hour, day, month and year, when it was recorded, and must indorse upon every such

instrument a certificate, stating the time as aforesaid, when, and the book and page where, the same was recorded.

This section was derived from Real Property Law of 1896, § 268.

Effect of conveyance recorded after filing of lis pendens: see Code Civ. Pro., § 1671.

Purpose of section.—The object of the section is to fix the time when the instrument was recorded in order that rights dependent upon time of record might be determined by evidence practically conclusive. It can have no effect upon the validity of the deed or of its execution, as such matters are made to depend upon other provisions of the statute, nor does it tend in the slightest degree to affect any of such provisions. Its sole object is to register the time of record for the very evident purpose of evidencing priority of rights. *Thorn v. Mayer*, (1895) 12 Misc. 487, 33 N. Y. S. 664. And the official duty imposed upon the clerk to certify upon the record the time of the day, month, and year when a conveyance was recorded, necessarily implies authority to make such entries as will render his certificate intelligible and operative. Such a power no more involves the right on the part of a clerk to construe a conveyance, or give a legal opinion as to its effect, than does the power which he undoubtedly possesses to certify as to the identity of other instruments, which he is usually called upon to exercise. *Putnam v. Stewart*, (1884) 97 N. Y. 411.

Effect of unrecorded conveyance.—An unrecorded conveyance is not void as against a subsequent purchaser, although for a valuable consideration, where he had notice of such unrecorded deed, and he cannot claim the benefit of the recording acts. *Dingley v. Bou*, (1892) 130 N. Y. 607, 29 N. E. 1023.

Deed and purchase money mortgage.—A deed and a purchase money mortgage, given at the same time, are to be construed together as forming one instrument or contract. *Rawson v. Lampman*, (1851) 5 N. Y. 456.

As to priority of lien of mortgages recorded at the same time, see *Lane v. Nickerson*, (1879) 17 Hun 148; *Bank for Savings v. Frank*, (1879) 45 Super. Ct. 404.

§ 320. Certain deeds deemed mortgages. A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.

This section was derived from Real Property Law of 1896, § 269.

Certain deeds declared grants: see *supra*, § 246.

Recording tax on mortgages: see TAX LAW, § 250 et seq.

Price as determining whether instrument was intended as mortgage: see 20 Ann. Cas. 1199 note.

Effect of lapse of time on right to have deed declared a mortgage: Ann. Cas. 1914B 354 note.

Effect of instrument of defeasance accompanying absolute conveyance: see Ann. Cas. 1914C 1079 note.

Parol evidence to show that deed absolute is mortgage: see L. R. A. 1916B 18 note.

Bar of limitation on debt as affecting deed absolute intended as mortgage: see 11 L. R. A. (N. S.) 825 note; 24 L. R. A. (N. S.) 840 note.

Right to accept favorable part of decree on absolute deed decreed to be a mortgage and to appeal from the rest: see 29 L. R. A. (N. S.) 11 note.

Absolute conveyance as security.—A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must

be considered a mortgage. *People v. Gass*, (1912) 206 N. Y. 609, 100 N. E. 404, affirming 151 App. Div. 911, 135 N. Y. S. 1132; *Mooney v. Byrne*, (1900) 163 N. Y. 86, 57 N. E. 163, reversing 15 App. Div. 624, 44 N. Y. S. 1124; *Macauley v. Smith*, (1892) 132 N. Y. 524, 30 N. E. 997; *Kraemer v. Adelsberger*, (1890) 122 N. Y. 467, 25 N. E. 859, reversing 55 Super. Ct. 246; *Barry v. Hamburg-Bremen Fire Ins. Co.*, (1888) 110 N. Y. 1, 17 N. E. 406, reversing 53 Super. Ct. 249; *Meehan v. Forrester*, (1873) 52 N. Y. 277. Such a deed is a mortgage with all the incidents thereof. *Odell v. Montross*, (1877) 68 N. Y. 499, reversing 6 Hun 155. See also *Stoddard v. Rotton*, (1859) 5 Bosw. 378.

Distinction between absolute deed of trust and conveyance in nature of mortgage.—There is a clear and well-recognized distinction between an absolute deed of trust, which places the property beyond the control of the grantor, and a deed of trust as security in the nature of a mortgage, in which case an equity of redemption is reserved to the grantor, for in the one case the conveyance is unconditional and indefeasible, although for the purpose of raising a fund to pay debts, and in the other it is for the purpose of securing debts, and is, therefore, defeasible. *Dryer v. Hopper*, (1914) 162 App. Div. 590, 147 N. Y. S. 1028.

Omission to record defeasance.—Where a deed is in fact a mortgage and there is a separate instrument of defeasance, the recording of it as a deed without at the same time recording every writing operating as a defeasance or explanatory thereof, is a nullity so far as giving constructive notice to subsequent purchasers or incumbrancers is concerned, and it cannot be received in evidence in any action or proceeding in this state unless the mortgage tax thereon is paid. *Matter of Mechanics' Bank*, (1913) 156 App. Div. 343, 141 N. Y. S. 473, reversing 79 Misc. 131, 140 N. Y. S. 698, affirmed (1913) 209 N. Y. 526 mem.; *Mutual Life Ins. Co. v. Nicholas*, (1911) 144 App. Div. 95, 128 N. Y. S. 902. Whether a right to redeem depends upon a separate written instrument or rests in parol, to operate as notice the instrument given as security for the debt must be recorded as a mortgage and not as a deed. *Odell v. Montross*, (1877) 68 N. Y. 499, reversing 6 Hun 155; *Matter of Mechanics' Bank*, (1913) 156 App. Div. 343, 141 N. Y. S. 473, reversing 79 Misc. 131, 140 N. Y. S. 698, affirmed (1913) 209 N. Y. 526 mem.

A deed absolute on its face to a mortgagee who gives back a separate defeasance agreement referring to the mortgage and bearing the same date, providing for the reconveyance of the property on the payment of the mortgage debt and certain advances within a year, will be deemed a mortgage rather than a conditional sale, and a provision of the defeasance agreement making time of the essence thereof is, therefore, ineffectual to cut off the right of redemption if not exercised within the time limited, where the property is worth much more than the amount of the indebtedness and it is expressly admitted that the deed was intended as security, notwithstanding that there is no covenant to pay the debt and that the defeasance agreement provides that it should not be recorded, and that there shall not be any claim for deficiency so long as the title is not disputed. *Mooney v. Byrne*, (1900) 163 N. Y. 86, 57 N. E. 163, reversing 15 App. Div. 624, 44 N. Y. S. 1124.

A deed of conveyance and a simultaneously executed sealed instrument in which the grantee agrees to reconvey to the grantor on payment in one year of the consideration named in the deed and interest are to be deemed a mortgage, and where these instruments are never recorded as a mortgage but the deed of conveyance is recorded as a conveyance, a mortgage executed by the grantor before the deed of conveyance but recorded thereafter has priority over the same; and the recording of a mortgage as a conveyance is ineffectual to secure it priority. *Hoschke v. Hoschke*, (1903) 42 Misc. 125, 85 N. Y. S. 1006.

Admission of oral evidence.—The admissibility of oral evidence to prove that a deed, absolute upon its face, was intended as a mortgage, is well established by authority. *Blewitt v. Boorum*, (1894) 142 N. Y. 357, 37 N. E. 119, 40 A. S. R. 600, affirming 59 Super. Ct. 321, 14 N. Y. S. 298; *Carr v. Carr*, (1873) 52 N. Y. 251, affirming 4 Lans. 314; *Meehan v. Forrester*, (1873) 52 N. Y. 277; *Fiedler v. Darrin*, (1872) 50 N. Y. 437, reversing 59 Barb. 651; *Horn v. Keteltas*, (1871) 46 N. Y. 605; *Matter of Mechanics' Bank*, (1913) 156 App. Div. 343, 141 N. Y. S. 473, reversing 79 Misc. 131, 140

N. Y. S. 698, affirmed (1913) 209 N. Y. 526 mem. But the burden of establishing an oral defeasance to a deed is an onerous one resting on whoever alleges it, and its existence, and also its precise terms, must be established by clear and conclusive evidence; otherwise the strong presumption that the deed expresses the entire contract between the parties to it is not overcome. *Ensign v. Ensign*, (1890) 120 N. Y. 655, 24 N. E. 942.

Recording of defeasance under Tax Law.—The statute relating to taxation of mortgages (Tax Law, § 250 et seq.) does not require a defeasance which converts an otherwise absolute grant into an equitable mortgage to be recorded or the mortgage tax paid on delivery of such defeasance which may be and often is executed and delivered long after the execution of the absolute grant. All the statute requires is the recording of the defeasance and the payment of the mortgage tax at any time before the mortgage is sought to be enforced. *Leavitt v. Waldemar Co.*, (1914) 88 Misc. 285, 151 N. Y. S. 832. See also *Gerken v. Sonnabend*, (1911) 130 N. Y. S. 605. Where absolute deeds of certain property are executed but simultaneously therewith an agreement is executed by the parties to such deeds that the grantees simply take the property to secure and protect certain creditors, the grantees simply to hold such property for sale and from the purchase price to pay such creditors, but the residue of the purchase price to be returned after such payment to the grantor, such deeds must be considered mortgages given for the security of such creditors and the agreement must not be recorded without paying a mortgage tax.

§ 321. Recording discharge of mortgage. A mortgage registered or recorded must be discharged upon the record thereof, by the recording officer, when there is presented to him the certificate signed by the mortgagee, his personal representative or assignee, and acknowledged or proved and certified in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge, and the certificates of its acknowledgement or proof, must be recorded and filed; and a reference must be made to the book and page containing such record in the minute of the discharge of such mortgage, made by the officer upon the record thereof. After such discharge has been recorded the recording officer shall make and deliver to the person in whose interest such discharge of mortgage is executed and recorded, his certificate setting forth the names of the mortgagor and mortgagee, the liber and page at which, the time when, such mortgage was recorded, and the date on which said mortgage was satisfied and discharged.

This section was derived from Real Property Law of 1896, § 270, as amended by L. 1903, ch. 490, § 1, and L. 1907, ch. 347, § 1.

Assignment of mortgage required in lieu of certificate of discharge: see supra, § 275.

Recording of conveyances: see supra, § 291.

Effect of recording assignment of mortgage: see infra, § 324.

Discharge of ancient mortgages: see infra, § 340 et seq.

Limitation of section. This section has application only to registered or recorded mortgages. A release or discharge of mortgage cannot be recorded unless the mortgage is recorded. *Op. Atty.-Gen.* (1911) 414.

Fraudulent satisfaction.—A fraudulent or forged satisfaction of a mortgage will be set aside and the mortgage restored as a valid lien. *Vohmann v. Michel*, (1906) 185 N. Y. 420, 78 N. E. 156, 113 A. S. R. 921, reversing 109 App. Div. 659, 96 N. Y. S. 309; *Weaver v. Edwards*, (1886) 39 Hun 233, affirmed without opinion (1890) 121 N. Y. 653, 24 N. E. 1092.

Discharge by one of two or more executors or administrators.—One of two or more executors or administrators may lawfully discharge a mortgage. *People v. Keyser*, (1863) 28 N. Y. 226, 84 Am. Dec. 338, reversing 39 Barb. 587.

Proof where discharge is executed by executor or administrator.—Where a satisfaction of a mortgage owned by an intestate in his lifetime is duly executed and acknowledged before a notary public by his administratrix and is presented by the persons liable thereon to a county clerk for record and discharge, the clerk is required not only to record the satisfaction but also to discharge the mortgage, and he cannot impose, as a condition of discharging it of record, that he first shall be furnished with a certificate of the proper surrogate that the person who executed the satisfaction was at the time the administratrix of the intestate. *Matter of Wadsworth*, (1899) 27 Misc. 264, 57 N. Y. S. 911. It has been held that a county clerk must accept the satisfaction piece of an executor appointed in another state, as under the circumstances such an executor is a "personal representative" of the testator within the meaning of the section. But in this case the discharge was accompanied by an authenticated certificate of a Connecticut probate judge showing the appointment of the executor. *People v. Fitzgerald*, (1893) 29 Abb. N. Cas. 471, 21 N. Y. S. 911.

Discharge by trustees.—Where a mortgage is held by two or more trustees all must unite in the discharge. *Vohmann v. Michel*, (1905) 109 App. Div. 659, 96 N. Y. S. 309, reversed on other grounds (1906) 185 N. Y. 420, 78 N. E. 156, 113 A. S. R. 921. But a sole and surviving trustee may lawfully discharge a mortgage. *People v. Keyser*, (1863) 28 N. Y. 226, 84 Am. Dec. 338, reversing 39 Barb. 587.

A trustee cannot discharge a mortgage where the act was not within the execution of the trust nor warranted by it. *Kirsch v. Tozier*, (1894) 143 N. Y. 390, 38 N. E. 375, 42 A. S. R. 729, affirming 63 Hun 607, 18 N. Y. S. 334; *McPherson v. Rollins*, (1887) 107 N. Y. 316, 14 N. E. 411, 1 A. S. R. 826; *Waterman v. Webster*, (1884) 33 Hun 611, affirmed (1888) 108 N. Y. 157, 15 N. E. 380.

§ 322. Recording discharge of mortgage in counties embraced in cities of first class. In counties wholly embraced in a city of the first class, no mortgage shall be discharged of record, unless in addition to the certificate provided and required by the preceding section, there shall be presented to the recording officer for cancellation the original mortgage, or a certified copy of an order made and entered as hereinafter provided. The said officer shall, at the time of the discharge of said mortgage, cancel said original mortgage by effacing the signatures thereto, without obliterating the same, and shall file the same in his office and keep the same so filed for the term of ten years. If for any reason said mortgagee, his personal representative or assign can not produce said original mortgage, the said officer shall not discharge said mortgage until there shall be delivered to him a certified copy of an order made and entered as hereinafter provided, which order shall be recorded and filed with the certificate of discharge, or the substitute for said certificate of discharge hereinafter referred to, and a reference must be made to the book and page containing such record in the minute of the discharge of such mortgage, made by the officer upon the record thereof. Where the mortgage shall have been lost, mutilated or destroyed, or upon which the signature or signatures are wholly obliterated or removed, or where for any reason production of said mortgage is rendered impossible or is refused by

the person having the same in his possession,¹ any person having any interest in securing the discharge of the same may apply to the supreme court or the county court in or of the county in which property affected by the mortgage, or any part thereof, is situated, upon a petition duly verified, containing the name and address of the owner of the property covered by the mortgage, the name and address of the owner of the bond and mortgage, to the best of the petitioner's knowledge and belief, and the owner thereof as appears of record, a full description of the mortgage and of any assignments thereof, that may appear upon the record, including the names of the mortgagor, mortgagee, assignor, assignee, date, amount, and the place, book, page and time of record of said mortgage and any assignments thereof, and a description of the property affected thereby, and showing the loss, mutilation or destruction of the mortgage, or obliteration or removal of the signature or signatures thereon or therefrom, or the impossibility of producing said mortgage, or the refusal to produce the said mortgage by the person having the same in his possession,² and the interest of the petitioner in the property or the mortgage, for an order dispensing with the production of the said mortgage and directing the discharge thereof. Eight days' personal notice of the application for such order shall be given to the then present owner of the real estate, and the mortgagor, the mortgagee, his or their personal representatives, heirs, successors or assigns as the case may require, except that where any of the parties upon whom service is herein required to be made can not with due diligence be personally served, the court to which the petition is presented may direct such mode of service as may appear proper. If sufficient cause be shown, the court may issue an order to show cause upon the petition returnable in less than eight days. Upon the return day of such notice or order to show cause, the court, upon due proof or service of the notice, or order to show cause, upon the parties above specified, and on further proof of the identity of the person presenting the petition, shall inquire, in such manner as it may deem advisable, into the truth of the facts set out in the petition, and upon proof satisfactory to the court that said mortgage has been lost, mutilated or destroyed, or that the signature or signatures have been obliterated or removed thereon or therefrom, or that the production of said mortgage is impossible or that its production is refused by the person having the same in his

¹ Words "or where for any reason production of said mortgage is rendered impossible or is refused by the person having the same in his possession," new.

² Words "or the impossibility of producing said mortgage, or the refusal to produce the said mortgage by the person having the same in his possession," new.

possession,³ and as to identity of the mortgagee, his personal representatives or assigns, and such proof in relation thereto as to the court may seem desirable, the court shall make an order dispensing with the production of the mortgage and directing its cancellation of record, as hereinabove provided. In case the mortgagee, his personal representatives or assigns, shall not appear in court upon the return day of said notice or order to show cause, or shall refuse or neglect, if present, to give the certificate for discharge above specified, the court may direct the amount due upon said bond and mortgage to be paid to the officer specified by law to hold court funds and moneys deposited in court in the county wherein the mortgaged premises are situated in whole or in part, and the mortgage to be cancelled of record in all counties where any of the lands affected by said mortgage are situated upon the production of a certified copy of the order and the receipt of such officer showing that the amount of said mortgage has been deposited with him, which receipt shall be a substitute for the certificate of discharge above specified. If in the proceedings had under and in pursuance of this section it shall appear to the satisfaction of the court that the principal sum and interest due upon said mortgage, or the bond accompanying the same has been fully paid, then the said deposit of money hereinabove provided for shall be dispensed with. The money deposited shall be payable to the mortgagee, his personal representatives or assigns, upon an order of the supreme or county court directing the payment thereof to him, made upon such evidence as to his right to receive the same as shall be satisfactory to the court.

This section was derived from Real Property Law of 1896, § 270a, as added by L. 1903, ch. 490, § 2, and amended by L. 1907, ch. 289, § 1. It was amended by L. 1912, ch. 254, § 1. The amendments are shown in the footnotes.

Classification of cities: see CONSTITUTION, art. XII, § 2.

Purpose of section.—The purpose of this section is to prevent subsequent fraudulent negotiation of mortgages which have been paid. *Matter of Leekie*, (1909) 131 App. Div. 816, 116 N. Y. S. 32.

Application to lost mortgages.—"While the language of the section is not as clear as it might be, it is perfectly plain that it provides a means whereby a mortgagee may properly satisfy of record a mortgage which he is unable to produce because of its loss or destruction. In case of loss or destruction the mortgagee could give a satisfaction piece, but it would be ineffectual to discharge the mortgage of record unless he could also deliver with it the mortgage itself." *Matter of Leekie*, (1909) 131 App. Div. 816, 116 N. Y. S. 32. See also *Matter of Connell*, (1912) 77 Misc. 251, 137 N. Y. S. 667.

Construction with section 333.—In a county embraced wholly in a city of the first class a mortgagor or any person having an interest in procuring the discharge of a mortgage which has been lost, mutilated or destroyed, should upon proof of the facts apply to the court under this section for an order dispensing with the production of the original mortgage and should not proceed under section 333, *infra*, as added by chapter 574 of the Laws of 1911, which applies only to cases of wilful neglect or refusal to produce the original mortgage, while the present section covers the case of inability. *Matter of Black*, (1912) 150 App. Div. 532, 135 N. Y. S. 504.

³ Words "or that the production of said mortgage is impossible, or that its production is refused by the person having the same in his possession," new.

§ 323. Recording discharge of mortgage in counties embraced in cities of first class where property lies in more than one of such counties. In any case, however, in which the land affected by a mortgage which is to be discharged lies in more than one such county, and in which the mortgage has been recorded in more than one such county, the original mortgage need be filed in one of said counties only. For the discharge of such mortgage in the other county or counties where the land is located there shall be required to be filed, together with a properly executed satisfaction piece, a copy of the mortgage certified to by the recording officer of the county in which the original mortgage shall have been filed, together with a certificate of said recording officer, stating that the said mortgage has been discharged in his county by the filing of the original mortgage, and stating the time when the mortgage was so discharged. The said certificate shall be recorded and filed with the satisfaction piece in the other county, and a reference shall be made to the book and page, containing such record, in the minute of the discharge of such mortgage, made by the officer upon the record thereof. The recording officer however, shall not discharge the said mortgage without first having compared his record of it with the certified copy of the recording officer of the other county, so as to satisfy himself of the identity of the records in the two counties, and he shall keep the said certified copy on file for ten years the same as though it were the original mortgage.

This section was derived from Real Property Law of 1896, § 270b, as added by L. 1907, ch. 621, § 1.

Classification of cities: see CONSTITUTION, art. XII, § 2.

§ 324. Effect of recording assignment of mortgage. The recording of an assignment of a mortgage is not in itself a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

This section was derived from Real Property Law of 1896, § 271.

Assignment of mortgage required in lieu of certificate of discharge: see supra, § 275.

Recording discharge of mortgage: see supra, § 321.

Effect of record of assignment.—The record of an assignment of a mortgage is constructive notice to all persons of the assignee's rights, except as provided by this section. *Browster v. Carnes*, (1886) 103 N. Y. 556, 9 N. E. 323; *Viele v. Judson*, (1880) 82 N. Y. 32, reversing 15 Hun 328; *Belden v. Meeker*, (1872) 47 N. Y. 307, affirming 2 Lans. 470; *New York Life Ins., etc., Co. v. Smith*, (1847) 2 Barb. Ch. 82; *Davies v. Jones*, (1899) 29 Misc. 253, 61 N. Y. S. 291; *Pettus v. McGowan*, (1885) 37 Hun 409. And the record of an assignment protects the assignee against a subsequent unauthorized discharge of the mortgage by the mortgagee. *Larned v. Donovan*, (1898) 155 N. Y. 341, 49 N. E. 942, affirming 84 Hun 533, 32 N. Y. S. 731. Where a negotiable instrument is secured by a mortgage the latter will not be discharge by payment to the record holder if, as a matter of fact, the note and mortgage have

already been transferred to a bona fide holder for value before maturity even though no assignment has been recorded. *Assets Realization Co. v. Clark*, (1912) 205 N. Y. 105, 98 N. E. 457, 41 L. R. A. (N. S.) 462, affirming 137 App. Div. 881, 123 N. Y. S. 1105.

Effect of unrecorded assignments.—Assignments, if not recorded, are void, not merely as against subsequent purchasers of the same mortgage, but also as against subsequent purchasers of the mortgaged premises, whose interests may be affected by such assignments, and whose conveyances are first recorded. *Bacon v. Van Schoonhoven*, (1882) 87 N. Y. 446, affirming 19 Hun 158; *Decker v. Boice*, (1880) 83 N. Y. 215, affirming 19 Hun 152. See also *Westbrook v. Gleason*, (1879) 79 N. Y. 23, reversing 14 Hun 245.

Status of assignee generally.—An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee. *Rapps v. Gottlieb*, (1894) 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun 115, 22 N. Y. S. 52; *Frear v. Sweet*, (1890) 118 N. Y. 454, 23 N. E. 910; *Bennett v. Bates*, (1884) 94 N. Y. 354, reversing 26 Hun 364; *Crane v. Turner*, (1876) 67 N. Y. 437, affirming 7 Hun 357; *Greene v. Warrick*, (1876) 64 N. Y. 220, reversing 4 Hun 703; *Schafer v. Reilly*, (1872) 50 N. Y. 61; *Bush v. Lathrop*, (1860) 22 N. Y. 535; *St. John v. Spalding*, (1873) *Thomp. & C.* 483.

Duty of mortgagor.—It is the rule that a mortgagor may continue to deal with a mortgagee in making payments until he has received notice of the assignment of the mortgage or notice of facts sufficient to put him on inquiry as to the continuance of the mortgagee's title. When he has received notice of such facts, then it becomes a question of good faith. If he has received notice of facts which would enable him, if he made the requisite inquiry, to ascertain the truth, then he is bound to make such inquiry, and if he omits to do so he is chargeable with bad faith, and is not protected in thereafter making payments to the mortgagee. *Stoddard v. Gailor*, (1882) 90 N. Y. 575; *Barnes v. Long Island Real Estate Exch., etc., Co.*, (1903) 88 App. Div. 83, 84 N. Y. S. 951. See also *Van Keuren v. Corkins*, (1876) 66 N. Y. 77; *Heermans v. Ellsworth*, (1876) 64 N. Y. 159, affirming 3 Hun 473, 5 *Thomp. C.* 605.

Duty of assignee.—If the assignee of a bond and mortgage wishes to protect himself against bona fide payments by the mortgagor to the mortgagee, he must notify the mortgagor of the assignment. *Van Keuren v. Corkins*, (1876) 66 N. Y. 77, affirming 4 Hun 129; *Reed v. Marble*, (1843) 10 Paige 409; *James v. Morey*, (1823) 2 Cow. 246, 14 Am. Dec. 475; *New York Life Ins., etc., Co. v. Smith*, (1847) 2 Barb. Ch. 82; see also *O'Callaghan v. Barrett*, (1892) 66 Hun 633 *mem.*, 21 N. Y. S. 368.

Assignment as conveyance.—An assignment of a mortgage is a conveyance within the meaning of the Recording Acts. *Bacon v. Van Schoonhoven*, (1882) 87 N. Y. 446, affirming 19 Hun 158; *Decker v. Boice*, (1880) 83 N. Y. 215, affirming 19 Hun 152; *Westbrook v. Gleason*, (1879) 79 N. Y. 23, reversing 14 Hun 245; *Van Keuren v. Corkins*, (1876) 66 N. Y. 77, affirming 4 Hun 129; *Briggs v. Thompson*, (1895) 86 Hun 607, 33 N. Y. S. 765; *St. John v. Spalding*, (1873) 1 *Thomp. & C.* 483.

Notation of assignment upon record of mortgage.—It is not imposed by statute as a duty upon the county clerk to note an assignment upon the margin of the record of a mortgage, and his omission so to do does not affect the rights of the assignee. *Viele v. Judson*, (1880) 82 N. Y. 32, reversing 15 Hun 328.

Contents of assignment.—It is not required, in order to make it the duty of a county clerk to record an assignment of a mortgage, that it should contain a statement of the place of record of the mortgage, or a description of the lands mortgaged; it is sufficient if it so identifies the mortgage that by examining the records the one referred to can be ascertained. *Viele v. Judson*, (1880) 82 N. Y. 32, reversing 15 Hun 328.

Forged assignment.—A mortgagee, who learns of a forged assignment of his mortgage, owes no duty to take steps to prevent loss to possible subsequent assignees; but he may become estopped by long continued inaction after payments of principal and interest become due. *Elmhorst v. Mazirow*, (1916) 176 App. Div. 145, 161 N. Y. S. 1029.

Merger.—A mortgage is not merged in the title to land when the mortgagee obtains the title after he has assigned the mortgage. *Curtis v. Moore*,

(1897) 152 N. Y. 159, 46 N. E. 168, 57 A. S. R. 506, affirming 10 Misc. 341, 31 N. Y. S. 19.

Application to purchaser of equity of redemption.—In the case of the purchaser of the equity of redemption, a record of the assignment of a mortgage is constructive notice to one desiring to make a payment on the mortgage. *Assets Realization Co. v. Clark*, (1912) 205 N. Y. 105, 98 N. E. 457, 41 L. R. A. (N. S.) 462, affirming 137 App. Div. 881, 123 N. Y. S. 1105; *Brewster v. Carnes*, (1886) 103 N. Y. 556, 9 N. E. 323.

Particular applications.—The assignee of a recorded mortgage upon real estate which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage has a valid lien as against a purchaser of the land from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee as well as the conveyance from the mortgagee to the purchaser were recorded before the assignment was placed on record. *Curtis v. Moore*, (1897) 152 N. Y. 159, 46 N. E. 168, 57 A. S. R. 506, affirming 10 Misc. 341, 31 N. Y. S. 19. Where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is a defense to an action upon the accompanying bond. *Mueller v. Goerlitz*, (1907) 53 Misc. 53, 103 N. Y. S. 1037. Where, after the assignment of a mortgage, the mortgagor pays interest to the assignor without notice or knowledge of the assignment, the assignee may make his assignor a party defendant to a suit of foreclosure for the purpose of recovering the payments received by him. *People's Trust Co. v. Gomolka*, (1908) 129 App. Div. 12, 113 N. Y. S. 49.

§ 325. Recording of conveyances made by treasurer of Connecticut. A conveyance of real property, executed at any time since the tenth day of March, eighteen hundred and twenty-five, by the treasurer of the state of Connecticut, acknowledged by him before the secretary of state of such state, and the acknowledgment of which is certified by such secretary of state under the seal of such state, in the manner required for the acknowledgment and certification of a conveyance within this state, may be recorded in the proper office within this state, without further proof thereof.

This section was derived from Real Property Law of 1896, § 272.
Recording of conveyances generally: see supra, § 291.

§ 326. Revocation to be recorded. A power of attorney or other instrument, recorded pursuant to this article, is not deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

This section was derived from Real Property Law of 1896, § 273.

Recording powers of attorney: see supra, § 294.

Recording generally: see supra, § 291.

Notice of revocation.—A recorded power of attorney gives notice to the world of the attorney's authority, and the termination of that authority, to be effective against purchasers in good faith from the attorney, should likewise be recorded. Thus without notice of revocation, parties are justified in acting upon the presumption of the continuance of the agency. *Johnson v. Christian*, (1888) 128 U. S. 374, 9 S. Ct. 87, 32 U. S. (L. ed.) 412; *Insurance Co. v. McCain*, (1877) 96 U. S. 84, 24 U. S. (L. ed.) 653; *Hatch v. Coddington*, (1877) 95 U. S. 48, 24 U. S. (L. ed.) 339; *Gratz v. Land*, etc.,

Imp. Co., (1897) 82 Fed. 381, 53 U. S. App. 499, 27 C. C. A. 305, 40 L. R. A. 393, writ of certiorari denied 173 U. S. 705, 19 S. Ct. 884, 43 U. S. (L. ed.) 1186.

Cited.—This section was cited in *Schreyer v. Schreyer*, (1904) 43 Misc. 520, 89 N. Y. S. 508, affirmed 101 App. Div. 456, 91 N. Y. S. 1065, which was affirmed by (1905) 182 N. Y. 555, 75 N. E. 1134.

§ 327. Penalty for using long forms of covenants. The recording officer of any county may charge for the recording of an instrument containing any of the covenants mentioned in section two hundred and fifty-three and two hundred and fifty-four of this chapter, at large, instead of the short forms thereof, in said sections contained, the sum of five dollars in addition to the fees chargeable by law for such recording.

This section was derived from Real Property Law of 1896, § 274.

Covenants not implied: see supra, § 251.

Short forms of deeds and mortgages: see supra, § 258.

§ 328. Certain acts not affected. Nothing contained in this article repeals or affects any act providing for recording and indexing instruments affecting real property in the city of New York, according to city blocks or other limited areas.

This section was derived from Real Property Law of 1896, § 275.

Indexes generally: see supra, § 316.

§ 329. Actions to have certain instruments canceled of record. An owner of real property or of any undivided part thereof or interest therein, may maintain an action to have any recorded instrument in writing relating to the same, other than those required by law to be recorded, declared void or invalid, or to have the same canceled of record as to said real property, or his undivided part thereof or interest therein.

This section was derived from Real Property Law of 1896, § 276.

Discharge of ancient mortgages: see infra, § 340 et seq.

Cancellation of attachment on real property: see Code Civ. Pro., § 711.

When and how lis pendens canceled: see Code Civ. Pro., § 1674.

Cancellation of docket of judgment: see Code Civ. Pro., §§ 1260, 1267.

Cancellation of exemption of real property from levy and sale under execution: see Code Civ. Pro., § 1404.

Jurisdiction of court of equity.—A court of equity has jurisdiction to cancel an apparent cloud upon a title. *Swarthout v. Ramier*, (1894) 143 N. Y. 499, 38 N. E. 726, affirming 67 Hun 241, 22 N. Y. S. 198; *Cox v. Clift*, (1848) 2 N. Y. 118, affirming 3 Barb. 481; *Pettit v. Shepherd*, (1835) 5 Paige 492. See also *Lattin v. McCarty*, (1869) 41 N. Y. 107, reversing 8 Abb. Pr. 223, 17 How. Pr. 239.

When action will not lie.—A court of equity will not entertain an action to remove a cloud from title to real estate, or for the cancellation of a written instrument, where it is apparent from an inspection of the deed or writing that no danger to the title or interest of the owner is to be apprehended. *Cox v. Clift*, (1848) 2 N. Y. 118, affirming 3 Barb. 481. And when the invalidity of the disputed title appears upon the face of the conveyance, or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside, because it is said that a title obviously void does not constitute

even a cloud upon the title of the true owner. *Moores v. Townshend*, (1886) 102 N. Y. 387, 7 N. E. 401.

Cancellation of mortgage on which no money was advanced.—An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee, and where, therefore, a bond and mortgage were executed and delivered to one upon the express understanding that he should advance thereon a sum specified, and that until the advance was made they were to be “invalid, void and of no effect,” and no advance was made but the holder assigned the instruments to an assignee who took in good faith and for value, it was held that the mortgage was invalid in the hands of the assignee and that an action was maintainable to have the same canceled as a cloud on the title. *Rapps v. Gottlieb*, (1894) 142 N. Y. 164, 36 N. E. 1052, affirming 67 Hun 115, 22 N. Y. S. 52.

Lien of assessment.—It is settled that to authorize the interposition of the court to remove the lien of an assessment as a cloud upon title, it must appear that the record or proceedings are not void upon their face, and that the claimant under it would not, by the proof which he would be obliged to produce in event of an attempt to enforce his claim, develop the defects rendering it invalid. *Dederer v. Voorhies*, (1880) 81 N. Y. 153.

Cancellation of tax deed.—Under the Act of 1873 (L. 1873, ch. 620) relating to the collection of taxes in Suffolk county, making the county treasurer's deed on sale of land for unpaid taxes conclusive evidence that the sale was regular and presumptive evidence of the regularity of all prior proceedings, it was held that where such proceedings were in fact void, an action to cancel the deed as a cloud on title was maintainable. *Sanders v. Downs* (1894) 141 N. Y. 422, 36 N. E. 391. See also *Stewart v. Chrysler*, (1885) 100 N. Y. 378, 3 N. E. 471.

Forged deed.—An action is maintainable for the cancellation, as a cloud on title, of a forged deed which, upon the strength of a false certificate of acknowledgment, made by an officer duly authorized, has been put upon record. *Remington Paper Co. v. O'Dougherty*, (1880) 81 N. Y. 474, modifying 16 Hun 594. See also *Easthampton v. Bowman*, (1893) 136 N. Y. 521, 32 N. E. 987.

Cancellation of instrument not entitled to record.—An action will lie to cancel of record an instrument which is not required nor entitled to be recorded under the recording acts, but which has, as a matter of fact, been recorded. *Davidson v. Fox*, (1901) 65 App. Div. 262, 73 N. Y. S. 533.

§ 330. Officers guilty of malfeasance liable for damages. An officer authorized to take the acknowledgment or proof of a conveyance or other instrument, or to certify such proof or acknowledgment, or to record the same, who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed by law in relation thereto, is liable in damages to the person injured.

This section was derived from Real Property Law of 1896, § 277.

False certificates of acknowledgment or proof: see PENAL LAW, § 885.

Recording instrument or conveyance without acknowledgment: see PENAL LAW, § 1862.

Offering in evidence forged or fraudulently altered documents or records: see PENAL LAW, §§ 810, 811.

§ 331. Laws and decrees of foreign countries appointing agents and attorneys and recording of the same. A copy of a law of a foreign country or of a decree of the executive power of such a country, appointing an agent or attorney with power to execute and deliver in the name or on behalf of such foreign

country, any instrument in writing granting, assigning, surrendering or in any manner affecting any estate or interest of such government in real property within this state, or assigning or discharging any lien or claim of such government upon real property within this state, or of a law or decree revoking such an appointment, if in English, or a translation into English of any such law or decree, if the original thereof be in a language other than English, when certified and recorded as hereinafter provided, shall be presumptive evidence of the authority of such agent or attorney. Certification of such copy or translation shall be made under the great seal of such foreign country and shall be to the effect that the same is a true copy or translation of such law or decree. Such copy or translation of such law or decree, when so certified, may be recorded in the office of the clerk or register of any county of this state, and such copy or translation when so certified and recorded, or a certified copy of the record thereof, shall be received as evidence in any court of this state. The authority conferred under any instrument so recorded shall not be deemed revoked as to property situated in any county except by the recording in such county of a copy or translation of a law or decree to that effect, duly certified in the manner hereinbefore provided. Nothing in this section shall in any way affect the right or power of a foreign country to acquire, hold or convey real property in this state, or be construed to confer any such right or power.

This section was derived from Real Property Law of 1896, § 276, as added by L. 1908, ch. 35, § 1.

Printed copies of laws of another state as evidence: see Code Civ. Pro., § 942.

Authentication of records of foreign courts and documents from foreign countries: see Code Civ. Pro., §§ 952, 953, 956.

§ 332. The record of certain conveyances validated. The record made prior to January first, nineteen hundred ¹and sixteen, in the county clerk's ²or register's office of any county in this state of any deed or mortgage or of any assignment or satisfaction piece of a mortgage otherwise authorized to be recorded therein when the acknowledgment or proof was taken in another county, notwithstanding the failure to append thereto a certificate as to the authority of the notary public, or other officer, who took the acknowledgment or proof, to take the same, shall be in all respects as valid and effectual as though such certificate had been appended to such instrument. Provided only that the notary public, or other officer, was duly authorized at the time of taking the proof or acknowledgment to take the same in the county where the instrument is recorded ³or in the county where the

¹ Words "and sixteen" new.

² Words "or register's" new.

³ Word "or" in place of "and."

same was taken, but this section shall not affect any action or proceeding pending on *January first, nineteen hundred and sixteen.

This section was derived from L. 1904, ch. 235, § 1, as amended by L. 1905, ch. 377, § 1. It was amended by L. 1916, ch. 365, § 1. The amendments are shown in the footnotes.

Acknowledgments and proofs within the state: see supra, § 298.

Notary's certificate as evidence: see Code Civ. Pro., § 923.

Proof of lost execution or writ under which sheriff's sale of real property was made: see Code Civ. Pro., § 961-e.

§ 333. When conveyances of real property not to be recorded. After September thirtieth, nineteen hundred and ten, a recording officer shall not record or accept for record any conveyance of real property executed subsequent to said September thirtieth, nineteen hundred and ten, unless the residence of the purchaser and if in a city of over five hundred thousand inhabitants according to the last federal census the street number of the residence of the purchaser shall be stated therein and such residence and street number shall be recorded with the conveyance. After May first, nineteen hundred and fourteen, a recording officer shall not record or accept for record any conveyance of real property executed subsequent to said first day of May, nineteen hundred and fourteen, if in a city of over two hundred thousand inhabitants according to the last federal census, unless the street number of the residence of the purchaser shall be stated therein and such residence and street number shall be recorded with the conveyance.

New. Added by L. 1910, ch. 227, and amended by L. 1914, ch. 309. The amendment added the last sentence to the section.

Another section 333 was added to the Real Property Law by L. 1915, ch. 574. See section 333, *infra*.

Recording of conveyances generally: see supra, § 291.

Application to corporations.—A conveyance of real property to a corporation need not, on being presented for record, state the principal place of business of the purchasing corporation. Op. Atty.-Gen. (1913) 343.

Cited.—This section was cited in *Gross v. Rowley*, (1911) 147 App. Div. 529, 132 N. Y. S. 541; *Bossie v. Edelson*, (1912) 76 Misc. 234, 134 N. Y. S. 615.

§ 333. [Discharge of mortgage.] 1. Upon the request of the mortgagor or of any other person interested in the mortgaged premises made at any time that payment thereof is entitled to be made and upon presentation of a satisfaction piece certifying that the mortgage has been paid or otherwise satisfied and discharged and consenting that it be discharged of record, and upon tender of payment of the sum or sums due as principal and interest upon the mortgage or upon the debt or obligation secured thereby, together with the fees allowed by law for taking the acknowledgment of a deed, a mortgagee of real property situate in this state,

* Words "January first, nineteen hundred and sixteen" in place of "May sixteenth, nineteen hundred and five."

must execute and acknowledge before a proper officer, in like manner as to entitle a conveyance to be recorded, such satisfaction piece, and thereupon deliver the same and the mortgage to the person making such tender of payment as aforesaid.

2. Upon the failure or refusal of any such mortgagee to comply with the foregoing provisions of this section any person having an interest in the mortgage or the debt or obligation secured thereby or in the mortgaged premises may apply to the supreme court or a justice thereof, or to the county court or a judge thereof, in or of any county in which the mortgaged premises or any part thereof are situated in whole or in part, upon a petition, for an order to show cause why an order should not be made by such court canceling and discharging the mortgage of record, and directing the register or clerk of any county in whose office the same may have been recorded to mark the same upon his records as canceled and discharged, and further ordering and directing that the debt or other obligation secured by the mortgage be canceled, upon condition that the sums tendered pursuant to the foregoing provisions of this section to be paid to the officer specified by law to hold court funds and moneys deposited in court in the county wherein the mortgaged premises are situated in whole or in part. Said petition must be verified in like manner as a verified pleading in an action in the supreme court and it must set forth the grounds of the application.

3. In any case where an actual tender, as provided in subdivision one of this section cannot with due diligence be made within this state, any person having an interest in the mortgage or the debt or obligation secured thereby, or in the mortgaged premises, may apply to the supreme court or a justice thereof or to the county court or a judge thereof, in or of any county in which the mortgaged premises or any part thereof are situated in whole or in part, upon petition setting forth the grounds of the application and verified as aforesaid, for an order to show cause why an order should not be made by said court canceling and discharging the mortgage of record, and directing the register or clerk of any county in whose office the same may have been recorded to mark the same upon his records as canceled and discharged and further ordering and directing that the debt or other obligation secured by the mortgage be canceled, upon condition that the principal sum of the mortgage or any unpaid balance thereof, with interest up to the date when said order shall be entered and the aforesaid fees allowed by law, be paid to the officer specified by law to hold court funds and moneys deposited in court in the county wherein the mortgaged premises are situated in whole or in part.

4. Eight days' notice of the application for either of the orders provided for in subdivisions two and three of this section shall be

given to the then mortgagee of record and also, if the petition show that there is a mortgage not of record, to such mortgagee. Such notice shall be given in such manner as the court or the judge or justice thereof to whom the petition is presented may direct, and said court or judge or justice may require such longer notice to be given as may seem proper. If sufficient cause be shown the court or judge or justice thereof may issue such order to show cause returnable in less than eight days.

5. Upon the return day of such order to show cause, the court, upon proof of due service thereof and on proof of the identity of the mortgagee and of the person presenting the petition, shall inquire in such manner as it may deem advisable, into the truth of the facts set forth in the petition, and in case it shall appear that said principal sum or any unpaid balance thereof and interest and the said fees allowed by law have been duly tendered but not accepted and said satisfaction piece has been duly presented for execution, or that such tender and presentation could not have been made within this state with due diligence, then the court shall make an order directing the sums so tendered, or in a case where such tender could not have been made as aforesaid; directing the principal sum or any unpaid balance thereof, with interest thereon to the date of entry of said order and the aforesaid fees allowed by law, be paid to the officer specified by law to hold court funds and moneys deposited in court in the county wherein the application herein is made, and directing and ordering that upon such payment the debt or other obligation secured by the mortgage be canceled and further directing the register or clerk of any and every county in whose office said mortgage shall have been recorded to mark said mortgage canceled and discharged of record upon the production and delivery to such register or clerk of a certified copy of the order and the receipt of such officer, showing that the amount required by said order has been deposited with him, which certified copy of said order and which receipt shall be recorded, filed and indexed by any such register or clerk in the same manner as a certificate of discharge of a mortgage. Said receipt need not be acknowledged to entitle it to be recorded. The money deposited shall be payable to the mortgagee, his personal representative or assigns, upon an order of the supreme court or county court, directing the payment thereof to him upon such evidence as to his right to receive the same as shall be satisfactory to the court.

6. Wherever any register or clerk shall record any order and receipt as hereinbefore specified, he shall mark the record of said mortgage as follows:

“Canceled and discharged by order of the
Court, County of, dated and filed
.....,” and thereupon the lien of such mortgage

shall be deemed to be discharged and the debt secured thereby shall be deemed to be canceled. Said register or clerk shall be permitted to charge for recording and filing said order and receipt, the same fees to which he is now entitled for recording and filing a certificate of satisfaction of a mortgage.

7. The word "mortgage" whenever used herein shall be construed to include the mortgagee or any other persons entitled to enforce or satisfy said mortgage and the personal representatives, successors and assigns, of such mortgagee or person, as the case may be.

New. Added by L. 1911, ch. 574, § 1.

Another section 333 was added to the Real Property Law by L. 1910, ch. 227, § 1. See section 333, *supra*.

Construction with section 322.—In a county embraced wholly in a city of the first class a mortgagor or any person having an interest in procuring the discharge of a mortgage which has been lost, mutilated or destroyed, should upon proof of the facts apply to the court under section 322, *supra*, for an order dispensing with the production of the original mortgage and should not proceed under the present section, as added by chapter 574 of the Laws of 1911, which only applies to cases of wilful neglect or refusal to produce the original mortgage, while section 322 covers the case of inability. *Matter of Black*, (1912) 150 App. Div. 532, 135 N. Y. S. 504.

§ 334. Maps to be filed; penalty for nonfiling. It shall be the duty of every person or corporation who, as owner or agent, subdivides real property into lots, plots, blocks or sites, with or without streets, for the purpose of offering such lots, plots, blocks or sites for sale to the public, to cause a map thereof, together with a certificate of the surveyor or draughtsman attached showing the date of the completion of the survey and of the making of the map and the name of the subdivision as stated by the owner, to be filed in the office of the county clerk or register of deeds of the county where the property is situated prior to the offering of any such lots, plots, blocks or sites for sale; and a duplicate copy of such map shall also be filed in the office of the city, town or village clerk where the property is situated before any such sale. All such maps must be printed or drawn upon tracing cloth, linen or canvass backed paper. All of such maps shall be placed and kept, by some suitable method, in consecutive order and shall be consecutively numbered in the order of their filing and shall be indexed under the initial letters of all substantives in the title of the subdivision. A failure to file any such map as required by the provisions of this section shall subject the owner of such subdivision, or of the unsold lots therein, to a penalty to the people of the state of twenty-five dollars for each and every lot therein sold and conveyed by or for such owner prior to the due filing of such map.

New. Added by L. 1910, ch. 415. It was amended by L. 1916, ch. 143, which added the last three sentences. It was further amended by L. 1917, ch. 592. This amendment added to the first section the concluding part thereof beginning "and a duplicate copy of such map."

ARTICLE 10

DISCHARGE OF ANCIENT MORTGAGES

Section 340. When mortgagor may petition for discharge of mortgage of record.

341. Presentation of petition.

342. Order to show cause.

343. Proceedings thereon.

344. When county clerk to discharge mortgage of record.

§ 340. When mortgagor may petition for discharge of mortgage of record. The mortgagor, his heirs or any person having and interest in any lands described in any mortgage of real estate in this state, which is recorded in this state, or mentioned in a deed recorded in this state, and which, from the lapse of time, is presumed to be paid, or in any moneys into which said lands have been converted under a decree of a court of competent jurisdiction, and which are held in place of such lands to answer such mortgage, may present his petition to the courts mentioned in this article, asking that such mortgage may be discharged of record. Such petition shall be verified; it shall describe the mortgage, and when and where recorded, or if such mortgage is not recorded that the same may be adjudged to have been paid and to be no longer a lien upon the lands therein described, and shall allege that such mortgage is paid; that the mortgagee has, or, if there be more than one mortgagee, that all of them have been dead for more than five years; or if such mortgage has been assigned by an instrument in writing for that purpose executed and acknowledged, so as to entitle the same to be recorded, and such instrument of assignment has been recorded in the office of the clerk of the county where the mortgaged premises, or some portion thereof is situated, and the assignee or assignees of said mortgage have been dead for more than five years, such petition shall state such facts, and no statement respecting the mortgagee or mortgagees or the names and places of residence of their heirs shall be required; or if such mortgagee be a corporation or association, that such corporation or association has ceased to exist and do business as such for more than five years; the time and place of his or their death, and place of residence at the time of his or their death; whether or not letters testamentary or of administration have been taken out, or, if said mortgagee or mortgagees, or assignee or assignees at the time of his or their death resided out of this state, whether or not letters testamentary or of administration have been taken out in the county where such mortgaged premises are situated; or if a corporation or

association, its last place of business; the names and places of residence, as far as the same can be ascertained, of the heirs of such mortgagee or mortgagees, or assignee or assignees; or, if such mortgagee be a corporation or association, then the names of one or more of the receivers, if any were appointed, or of the person who has the care of the closing up of the business of such corporation or association, and that such mortgage has not been assigned or transferred, and if such mortgage has been assigned, state to whom and the facts in regard to the same. Provided, however, that if such mortgage has been duly assigned, by indorsement thereof or otherwise, but not acknowledged so as to entitle the same to be recorded, then it shall be competent for the court, at any time within the period aforesaid, upon proof that all the matters hereinbefore required to be stated in said petition are true, and that the assignee of such mortgage if living, or his personal representative if dead, has been paid the amount due thereon, to make an order that such mortgage be discharged of record. Provided, further, that in case of a mortgage which was recorded or adjudged to have been paid and no longer a lien, more than fifty years prior to the presentation of such petition, if the petitioner is unable with reasonable diligence to ascertain the facts herein required to be stated in the petition, other than the fact of payment, the petition may set forth the best knowledge and information of the petitioner in respect thereto and what efforts have been made to ascertain such facts, and if the court shall be satisfied that the petitioner has made reasonable effort to ascertain such facts, and that the same can not be ascertained with reasonable diligence, it may then, in its discretion, proceed upon said petition as hereinafter provided.

This section was derived from L. 1862, ch. 365, § 1, as amended by L. 1901, ch. 287, § 1.

Actions to have certain instruments canceled of record: see *supra*, § 329.

Jurisdiction of county court in action for satisfaction of mortgage: see Code Civ. Pro., § 340.

Limitation of action to redeem from mortgage: see Code Civ. Pro., § 379.

Limitation of action upon sealed instrument: see Code Civ. Pro., § 381.

Presumption of death in certain cases: see Code Civ. Pro., § 841.

Purpose of statute.—In an early case it was declared that the statute was designed to remove an existing incumbrance which had been paid in fact and not by mere presumption of law; that its object seemed to have been to relieve mortgagors and those claiming under them, in a summary way, from an incumbrance which from the lapse of time is presumed to be paid, if it had in fact been paid, but satisfaction of which could not be obtained without a formal proceeding therefor in a court of equity in consequence of the death of the mortgagee and of the fact that no letters testamentary or of administration had been granted in this state. *Matter of Townsend*, (1875) 4 Hun 31, appeal dismissed (1875) 63 N. Y. 631.

Presumption of payment.—It is well settled that after the mortgage debt has been due twenty years the presumption of payment becomes conclusive in the absence of proof of a payment within that period, and that such a presumption may be invoked is no longer open to discussion in this state. *Martin v. Stoddard*, (1891) 127 N. Y. 61, 27 N. E. 285; *Ouvrier v. Mahon*, (1907) 117 App. Div. 749, 102 N. Y. S. 981; *Belmont v. O'Brien*, (1855) 12

N. Y. 394; *Forbes v. Reynard*, (1906) 113 App. Div. 306, 98 N. Y. S. 710; *Forsyth v. Leslie*, (1902) 74 App. Div. 517, 77 N. Y. S. 826; *Paquet v. Melcher*, (1899) 42 App. Div. 76, 58 N. Y. S. 913; *Knapp v. Crane*, (1897) 14 App. Div. 120, 43 N. Y. S. 513. And where payment of a sealed obligation for the payment of money is *prima facie* presumed from lapse of time, such presumption has the same force and legal effect as if the fact had been proved in any other manner. *Martin v. Stoddard*, (1891) 127 N. Y. 61, 27 N. E. 285; *Morey v. Farmers' Loan, etc., Co.*, (1856) 14 N. Y. 302, reversing 18 Barb. 401.

Under the Revised Statutes (2 R. S. 301, § 48) the presumption of payment was as follows: "After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment, but such presumption may be repelled by proof of payment of some part or by proof of a written acknowledgment of such right of action within that period." See also *Murdock v. Waterman*, (1895) 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, reversing 71 Hun 320; *Katz v. Kaiser*, (1896) 10 App. Div. 137, 41 N. Y. S. 776, affirmed (1897) 154 N. Y. 294, 48 N. E. 532; *Fisher v. New York*, (1876) 67 N. Y. 73, reversing 6 Hun 64.

§ 341. Presentation of petition. Such petition may be presented to the supreme court in the county where the mortgaged premises are situated, or to the county court of such county.

This section was derived from L. 1862, ch. 365, § 2, as amended by L. 1882, ch. 100, § 1.

§ 342. Order to show cause. The court, upon the presentation of such petition, shall make an order requiring all persons interested to show cause at a certain time and place, why such mortgage should not be discharged of record. The names of the mortgagor, mortgagee and assignee, if any, the date of the mortgage and where recorded, and the town or city in which the mortgaged premises are situate, shall be specified in the order. The order shall be published in such newspaper or newspapers, and for such time as the court shall direct. The court may also direct the order to be personally served upon such persons as it shall designate.

This section was derived from L. 1862, ch. 365, § 3.

Statement as to assignment.—The chief object of requiring the statement of an assignment is to enable the court to have all persons interested notified of the application in accordance with this section. *Matter of Townsend*, (1875) 4 Hun 31, 6 Thomp. & C. 227, appeal dismissed (1875) 63 N. Y. 631.

§ 343. Proceedings thereon. The court may issue commissions to take the testimony of witnesses and may refer it to a referee to take and report proofs of the facts stated in the petition. The certificate of the proper surrogate or surrogates, whether or not letters testamentary or of administration have been issued, shall be evidence of the fact; and the certificate of the clerk of the county or counties in which the mortgaged premises have been situate, since the date of the said mortgage, shall be evidence of the assignment of such mortgage, or of a notice of the pendency

of an action to foreclose such mortgage, and of such other matters as may be therein stated; or if a notice of the pendency of an action to foreclose such mortgage has been filed, then his certificate that such mortgage has never been foreclosed, unless the allegation of payment shall be denied, and evidence be given tending to rebut the presumption of payment, arising from lapse of time, such lapse of time shall be sufficient evidence of payment. Upon being satisfied that the matters alleged in the petition are true, the court may make an order that the mortgage be discharged of record.

This section was derived from L. 1862, ch. 365, § 4, as amended by L. 1882, ch. 278, § 1.

Limitation of action to redeem from mortgage: see Code Civ. Pro., § 379.

"Upon being satisfied."—The court must be satisfied that all the matters alleged in the petition are true. *Matter of Townsend*, (1875) 4 Hun 31, 6 Thomp. & C. 227, appeal dismissed (1875) 69 N. Y. 631.

§ 344. When county clerk to discharge mortgage of record.

The county clerk, upon being furnished with a certified copy of such order and paid the fees allowed by law for discharging mortgages, shall record said order and discharge the mortgage of record.

This section was derived from L. 1862, ch. 365, § 5.

Fees of county clerks generally: see Code Civ. Pro., § 3304.

ARTICLE 11

QUIETING TITLE TO REAL PROPERTY

Section 360. When special proceedings to quiet title may be maintained.

361. Petition.

362. Order for publication of notice to persons interested.

363. Owners of several parcels may unite in proceedings.

364. Hearing and final order upon non-appearance of adverse claimants.

365. Hearing and final order upon appearance of adverse claimants.

366. Notice of pendency to be filed and recorded.

§ 360. When special proceedings to quiet title may be maintained. Whenever real property shall have been conveyed by a sheriff or referee, pursuant to a judicial decree, which decree has been lost or destroyed, and the defendants (other than lienors or incumbrancers) named in the notice of pendency of the action in which such decree was made, or those who might claim under them, or either of them, are dead, unknown or their whereabouts can not after diligent inquiry be ascertained, the person who has been, or he and those having his estate who have been, for thirty years in actual possession of such property claiming it in fee under said sheriff's or referee's deed, which deed shall have been recorded at least thirty years, may maintain a special proceeding for the purpose of establishing judicially his or their title to such real property.

This section was derived from L. 1890, ch. 503, § 1.

Action to determine claim to real property: see Code Civ. Pro., § 1638 et seq.

Evidence in actions or proceedings involving title to real property: see Code Civ. Pro., § 1688-a et seq.

§ 361. Petition. A person or persons, desiring to institute a proceeding under this article, must present a petition to the supreme court at a special term to be held in the judicial district in which the real property is situated, setting forth the facts proving to the satisfaction of the court, that the case is one of those specified in section three hundred and sixty, and must describe the property with common certainty, and state what, if any, liens or incumbrances exist thereon, and the names of the persons, if any, besides the petitioners, who have been in the actual possession of the property during the past thirty years claiming title as owners thereof in fee, and how such title was derived, and shall also annex to said petition a duly certified copy of the sheriff's

or referee's deed recorded thirty years since under which petitioners claim title.

This section was derived from L. 1890, ch. 503, § 2.

§ 362. Order for publication of notice to persons interested. Upon the presentation of such petition, duly verified in the manner prescribed for the verification of pleadings by the code of civil procedure, the said court shall make an order for the publication of a notice requiring all persons claiming any interest in the real property described in such petition to appear before the court at a special term thereof, to be held at a time and place to be therein specified, not less than three months nor more than six months thereafter, and show cause, if any they have, why they should not be forever barred from maintaining any action or proceeding for the recovery of the real property, which shall be substantially described as set forth in said petition, and which notice shall also contain a reference to the time and place of record of the sheriff's or referee's deed referred to in this article. Said publication shall be made once a week for three months successively prior to the return day named in said notice in two newspapers designated in the order as most likely to give notice to any claimant of the property.

This section was derived from L. 1890, ch. 503, § 3. It was amended by L. 1909, ch. 240, § 70, by which the last sentence was added.

Verification of pleadings: see Code Civ. Pro., § 523 et seq.

§ 363. Owners of several parcels may unite in proceedings. In case the property described in said sheriff's or referee's deed shall have been subdivided, the owner or owners of the several parcels thereof may unite in the same petition and proceeding provided for by this article.

This section was derived from L. 1890, ch. 503, § 4.

§ 364. Hearing and final order upon non-appearance of adverse claimants. Upon the return day named in said notice the court shall proceed summarily to inquire into the truth of the matters set forth in the petition, and may appoint a referee for that purpose, and if there shall be no appearance by any person claiming any adverse interest to the petitioners in the real property described in the petition, the court may make a final order declaring that the title of the petitioner to such real property has been judicially established, which final order, together with the petition and order for and proof of publication of the notice, and the proofs taken before the court or referee shall be filed in the office of the clerk of the county in which the real property is situated, and such final order shall be evidence of the facts so declared to be established thereby in all courts and places, and

thereafter no action or proceeding for the recovery of the real property described in said final order or any part thereof, or of any interest therein, shall be maintained by any person named as a defendant in the notice of pendency of action referred to in section three hundred and sixty, or by any person or persons claiming under such defendant or either of them.

This section was derived from L. 1890, ch. 503, § 5.

§ 365. Hearing and final order upon appearance of adverse claimants. If any person shall appear on the return day of said notice and claim in writing an interest in the real property adverse to that of the petitioners, stating the nature of his claim and his place of residence, the court may proceed in like manner to inquire into the truth of the facts stated in the petition and may make a final order in like manner and with like effect as above provided, except that such final order shall not affect in any way any person who shall have appeared on the return day and asserted a claim adverse to the petitioners, as herein provided for.

This section was derived from L. 1890, ch. 503, § 6.

§ 366. Notice of pendency to be filed and recorded. No such final order shall be made until the petitioners named in said proceedings, or their attorney, shall file in the clerk's office of the county in which such real property is situated a notice of the pendency of the said special proceeding, containing the names of all the persons claiming to be then owners of the property in fee, pursuant to said sheriff's or referee's deed, the object of the proceeding, together with a brief description of said property. Each county clerk with whom such notice is filed must immediately record it in the book kept in his office for recording of notices of pendency of an action, and index it to the name of each person claiming to be owner as aforesaid, and said clerk shall be entitled to receive for his services the same fees therefor as are now allowed by law for filing, recording and indexing a notice of pendency of action.

This section was derived from L. 1890, ch. 503, § 7.

Recording books and indexes: see supra, §§ 315, 316.

Legal title as presumptive evidence of possession: see Code Civ. Pro. § 368.

Recording and indexing of lis pendens: see Code Civ. Pro., § 1672.

ARTICLE 12 *

REGISTERING TITLE TO REAL PROPERTY

- Section 370. Application to register title to real property.
371. Applications and proceeding to be in the supreme court; title part of special term.
372. County clerks and registers to be registrars of title.
373. Registrar's bond.
374. Deputy registrars' powers and duties.
375. Compensation of registrars and deputy registrars and registration clerks.
376. Disposition and use of fees received by registrar.
377. Official examiners of title.
378. What owners may apply; what titles may be registered.
379. Contents of application for registration; other papers to be filed.
380. Official examiner's report of title; other evidences of title.
381. Survey, map, or plan to be filed.
382. Notice of application and of pendency of action.
383. Filing of caution.
384. Agent of nonresident applicant.
385. Commencement of the action.
386. Notice of object of action; copy of complaint.
387. Summons and notice to be posted on the land.
388. Guardian ad litem.
389. Any person interested may appear and defend.
390. Title in lands vested; clouds thereon removed.
391. Judgments and orders conclusive.
392. Fraud; action to set aside the judgment or to recover the property.
393. Registration of titles.
394. Certificate of title.
395. Registration book.
396. Duplicate certificate of title.
397. Owner's receipt for certificate of title.
398. Certificate to include dealings pending registration.
399. Certificate of title as evidence.
400. Rights of owners of registered property; exceptions; incumbrances and transfers to be filed.
401. Registered property not affected by prescription or adverse possession.
402. Fraud; notice only by registration.
403. Memorial to be carried forward.

* This article was derived from L. 1908, ch. 444, known as "The Land Title Registration Law."

- Section 404. Registered property to remain registered.
405. Registered property subject to same rights and burdens as unregistered property.
406. Transfers of registered property.
407. Certificate as to part of property remaining after transfer.
408. Book of covenants, restrictions, trusts and forms.
409. Filing, entering and indexing papers pursuant to this act; tickler certificate.
410. Notice of filed papers.
411. Addresses of interested parties; notice.
412. When a transfer is deemed to be registered.
413. New certificates of title.
414. Loss of owner's duplicate.
415. Mortgages, leases and other liens and charges; may be registered.
416. Proceedings to register mortgage, lease or other lien or charge.
417. Judgments, decrees, attachments and other liens to be noted on certificate.
418. Assignment of mortgage, lease, or other lien or charge.
419. Release, discharge or surrender of charge or incumbrance.
420. Enforcement of mortgages, charges, liens and incumbrances.
- 420a. Registration under judicial sales.
421. Powers of attorney to be filed and registered.
422. Reference of doubtful matters to the court.
423. Death of registered owner; transfer of property.
424. Certificate of title during settlement of estate.
425. Title derived through execution of a power in a will.
426. Assurance fund.
427. Compensation from assurance fund.
428. Action against assurance fund.
429. Restrictions on claims against assurance fund.
430. Penalties for fraudulent acts or false certificates.
431. Forgery and fraudulent stamping; penalty.
432. Fees to be charged.
433. Construction of articles.
434. Form for official examiner's report of title.
435. Form for certificate of title.

§ 370. Application to register title to real property. Real property, or any estate, interest, or right therein, the title to which is hereby authorized to be registered, may be brought under the operation of this article by the filing of a complaint, verified

as prescribed by the code of civil procedure and praying for registration, with the ¹ clerk of the county in which the land, or some portion thereof, is situated. The application may be so made in person by the owner or owners of such property, estate, interest, or right, or by an attorney at law duly authorized so to do. A corporation may also apply by its duly authorized officer or agent. An infant or other person under disability may apply by his legally appointed guardian, or trustee, or committee. The natural person or corporation, in whose behalf the complaint is filed may be known, and is treated in this article, as the applicant, or plaintiff. The complaint so filed may be known, and is treated in this article, as the application.

This section was derived from L. 1908, ch. 444, § 2. It was amended by L. 1910, ch. 627, § 1. The amendment is shown in the footnote.

Construction of article: see *infra*, § 433.

What owners may apply and what titles may be registered: see *infra*, § 378.

Contents of application for registration: see *infra*, § 379.

No title to be registered unless free from reasonable doubt: see *infra*, § 391.

Who may make verification and form thereof: see Code Civ. Pro., §§ 525, 526.

Torrens acts generally: see notes, 12 Ann. Cas. 834; Ann. Cas. 1913C 871; Ann. Cas. 1917B 22; L. R. A. 1916D 15.

Purpose of statute.—The intention of article 12 of the statute is to provide a new system of land registration whereby persons can ascertain by an inspection of the register in whom the title to a particular piece of property is vested; and the object and purpose of the act is to register good titles and not to cure bad ones. *Partenfelder v. People*, (1914) 211 N. Y. 355, 105 N. E. 673, affirming 157 App. Div. 462, 142 N. Y. S. 915; *Sherman v. Carman*, (1915) 169 App. Div. 17, 154 N. Y. S. 484; *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785; *Eldert v. Cross Country R. Co.*, (1915) 88 Misc. 684, 151 N. Y. S. 441; *Crabbe v. Hardy*, (1912) 77 Misc. 1, 135 N. Y. S. 119.

Inherent governmental power to register titles.—As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. *American Land Co. v. Zeiss*, (1911) 219 U. S. 47, 31 S. Ct. 200, 55 U. S. (L. ed.) 82. In *United States v. Fox*, (1876) 94 U. S. 315, 24 U. S. (L. ed.) 192, it was said: "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See also *Arndt v. Griggs*, (1890) 134 U. S. 316, 10 S. Ct. 557, 33 U. S. (L. ed.) 918.

Character of title essential to registration.—There inheres in the people of the state an interest in a true, just and conclusive registration of the titles to the lands within the state. A system of procedure which would secure or permit the registration of false, defective or questionable titles would give rise to conflicts of ownership, litigation, or appeals for legislative relief, and be inimical to public peace and contentment and of brief existence. *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with

¹ Words "officer hereinafter described as the registrar," omitted. Word "clerk" new.

further discussion (1915) 213 N. Y. 554, 107 N. E. 1034. And a title which may be registered must be one which is marketable and free from reasonable doubt; in other words, such title as a court of equity would compel an unwilling purchaser to accept in an action for specific performance. *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785.

Curing defects of title.—In an action under the statute an apparent cloud on the title may be removed, but a valid lien on or legal claim to such real estate cannot be extinguished or destroyed in this way. *Sherman v. Carman*, (1915) 169 App. Div. 17, 154 N. Y. S. 484. And it is the duty of the court to examine carefully the chain of title as set forth in the examiner's certificate and accompanying proofs, and if it appears that the title is questionable, refuse its registration, leaving the parties to other action to cure the defects. *Eldert v. Cross Country R. Co.*, (1915) 88 Misc. 684, 151 N. Y. S. 441; *Crabbe v. Hardy*, (1912) 77 Misc. 1, 135 N. Y. S. 119.

Failure to establish title.—The legislature did not establish a method of registering land titles as a device to enable one party to acquire the title of others without their knowledge. Upon a plaintiff's failure to establish title in an action brought for that purpose it is the duty of the court to dismiss the complaint irrespective of whether any of the defendants have appeared in the action. *Barkenthien v. People*, (1915) 213 N. Y. 554, 107 N. E. 1034.

Burden of proof.—The burden of proving the facts constituting the cause of action is upon the plaintiff and can be met, presumptively, so far as the mere denials of the answer have effect, by the facts alleged in those documents which are relevant and tend to sustain it. In case the plaintiff is not satisfied with the presumptive evidence consisting of those allegations and statements or there are facts in issue essential to his cause of action which the statements and allegations of the documents annexed to the complaint do not tend to support, he shall resort to the ordinary rules of evidence and proof. *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

§ 371. Applications and proceedings to be in the supreme court; title part of special term. The application for registration must be made to the supreme court; ¹ or to a justice thereof, sitting at a special term in any of the counties within the judicial department where the property is situated, and for that purpose said court shall be always open; and its orders, judgments and decrees in cases coming under this article may be made and entered as well in vacation as in term time. The proceedings upon such applications shall have the effect of proceedings in rem against the land, and the judgments shall operate directly on the land and vest and establish title thereto. An issue raised in such a case shall be tried at a special term of said court, in the county in which the application is filed, by the court or a referee, except that an issue of fact may be tried by a jury, in the manner prescribed by the constitution and code of civil procedure. When in any county the amount of business under this article makes it necessary or proper that ² such business should be attended to by one or more

¹ Words "or to a justice thereof, sitting at a special term . . . where the property is situated," new.

² Words "such business should be attended to by one or more justices of said court assigned for that purpose" new and in place of "one or more justices of said court should devote his or their entire time to such business."

justices of said court assigned for that purpose, the appellate division of the judicial department in which such county is situated shall designate as many justices as may be deemed necessary, to constitute the "title part" of the special term in that court; and said appellate division ³ shall provide by rules of practice for the conduct, in said title part, of the business coming under this article in such county. Said appellate division may assign one or more additional justices to said "title part" of the special term, or withdraw one or more justices therefrom, as the business coming under this article ⁴ may require and the availability of the supreme court justices ⁵ make proper. One of the justices so assigned to the "title part" of the special term in any county shall be designated by said appellate division to have general supervision and control of the business coming under this article in that county; ⁶ and so far as is reasonably possible, such designation shall remain unchanged, and such justice shall be retained continuously in such term and part during his term of office unless in the opinion of the appellate division a change is required for the better enforcement or working of this law. One and the same justice may be assigned so as to have such general supervision and control in two or more counties of the judicial district for which he is elected. Other duties may be assigned by such appellate division to such justice, provided that they do not interfere with his work in supervising and controlling the business coming under this article. The justice assigned, as herein provided, to have general supervision and control of the business coming under the article in any county, shall also have general supervision and control of all the official examiners within such county and it shall be his duty to observe and supervise their work as such official examiners, to advise them when necessary and to make any suggestions or recommendations to the appellate division with respect to discipline, suspension or removal of any of them as to him may seem necessary or proper in the interests of the successful operation of this law.

This section was derived from L. 1908, ch. 444, § 3. It was amended by L. 1916, ch. 547, § 1. The amendments are given in the footnotes.

Contents of application: see infra, § 379.

Judgments and orders conclusive: see infra, § 391.

Pleadings.—The complaint and the pleadings of the defendants create the issues precisely as would such pleadings in the ordinary action under the Code of Civil Procedure, and those issues are triable according to the laws of this state and the rules of court, except that allegations of the complaint denied by an answer may presumptively be proven by the relevant facts stated in the certificate of title, the abstract, searches and survey. *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

³ Word "shall" in place of "may."

⁴ Words "may require" new.

⁵ Words "may require and" omitted.

⁶ Remainder of section new.

Judgment on decision of referee.—Although section 391, *infra*, provides that “no judgment of registration shall be made, unless the court is satisfied that the title to be registered accordingly is free from reasonable doubt,” this does not mean necessarily that the court itself must determine the issues raised by the pleadings, for this section provides that the issues shall be tried by the court or a referee. Hence where the issues in an action to register title to real property have been referred to an official referee “to hear and determine” a judgment may be entered on his decision. *Jamieson, etc., Co. v. Reynolds*, (1915) 169 App. Div. 107, 154 N. Y. S. 836.

Cited.—This section was cited in *Hawes v. United States Trust Co.*, (1911) 142 App. Div. 789, 127 N. Y. S. 632.

§ 372. County clerks and registers to be registrars of title.

County clerks in the several counties of the state, except the counties that may have registers, and in the latter counties the registers of said counties shall be “registrars” of titles in their respective counties. All laws relative to registers, county clerks and their deputies shall extend to registrars and their deputies, so far as the same may be applicable, except as in this article otherwise provided. Registrars of titles shall be county officers, within the meaning of the laws of this state.

This section was derived from L. 1908, ch. 444, § 4.

County clerks generally: see COUNTY LAW, § 160 et seq.

Register of county generally: see GENERAL CONSTRUCTION LAW, § 42.

Cited.—This section was cited in *Op. Atty.-Gen.* (1912) 216.

§ 373. Registrar's bond. Every registrar, before entering upon his duties as registrar, shall give a bond with sufficient security, to be approved by a justice of the supreme court, payable to the people of the state of New York, in a penal sum the same as that for his bond as register or county clerk, conditioned for the faithful discharge of his duties, and to deliver up all papers, books, records and other property belonging to the county or appertaining to his office as registrar of titles, whole, safe and undamaged, when lawfully required so to do, which bond shall be filed in the office of the secretary of state.

This section was derived from L. 1908, ch. 444, § 5.

Bond and undertaking generally: see GENERAL CONSTRUCTION LAW, § 14; PUBLIC OFFICERS LAW, § 11 et seq.

§ 374. Deputy registrars' powers and duties. In any county where the business under this article so requires, the registrar may appoint a chief deputy and as many other deputies as are needed. But no one unless he is also a deputy register or an assistant deputy register appointed under statutory authority, or a deputy county clerk, shall be appointed as such deputy registrar unless he is an “official examiner of title” as described and required by section three hundred and seventy-seven of this chapter. Deputies may perform any and all duties of the registrar in the name of the registrar, and the acts of such

deputies shall be held to be the acts of the registrar, and in case of the death of the registrar, or his removal from office, the chief deputy shall thereupon become the acting registrar until such vacancy shall be filled according to law, and he shall file a like bond and be vested with the same powers and subject to the same responsibilities and entitled to the same compensation as in the case of the registrar.

This section was derived from L. 1908, ch. 444, § 6. It was amended by L. 1909, ch. 305, which added the words "or an assistant deputy register appointed under statutory authority" which follow the words "deputy register" near the beginning of the second sentence. Laws 1916, ch. 547, § 2, purports to amend this section but the wording of the amending section and the section amended are identical.

Deputies generally: see PUBLIC OFFICERS LAW, § 9.

Deputy county clerk and duties: see COUNTY LAW, §§ 162, 163.

§ 375. Compensation of registrars and deputy registrars and registration clerks. Where county clerks and registers are already salaried officials, the local authorities (county officials who provide for county expenses) shall fix their additional compensation as registrars, also the compensation of deputy registrars, the clerks, et cetera, needed to carry on the work under this article. Where a county clerk or a register is compensated directly by the fees paid to himself, his deputies and assistants, the fees paid to him as registrar shall take the usual course and be used to compensate deputies, clerks, et cetera, at such rates as the registrar may fix, the remainder to belong to him.

This section was derived from L. 1908, ch. 444, § 7.

Fees to be charged: see *infra*, § 432.

Additional compensation.—The attorney-general has ruled that it was clearly the intent of the legislature that county clerks and registrars whose offices were salaried ones should be allowed additional compensation as registrars for the additional work imposed upon them by the statute, and that it is the duty of county officials who provide for county expense to fix the additional compensation prescribed by the section for county clerks and registrars whose offices were salaried ones at the time of the passage of said law. Op. Atty.-Gen. (1909) 875.

§ 376. Disposition and use of fees received by registrar. All fees received by a registrar, for the performance of the duties devolving upon him pursuant to this article, shall be disposed of in such manner as the other fees paid to county clerks and registrars, with the following proviso: In those counties where registrars under this article are or shall become salaried officials, all fees paid for the registration of titles shall be kept separate by the registrars and serve, so far as they are necessary or adequate, to pay the expenses of registering titles and the other duties for which charges are made. It shall be the duty of the local authorities who provide for county expenses to provide such accommodations, help, safes, books, papers and for such other expenses as

may properly be required by the registrar in the conduct of his office.

This section was derived from L. 1908, ch. 444, § 8.

Fees to be charged: see *infra*, § 432.

§ 377. Official examiners of title. Before application is made for the registration of a title, it must be thoroughly examined and certified by an "official examiner of title." A person duly admitted to practice as an attorney and counselor-at-law in the courts of record of this state, or a corporation duly incorporated under and by virtue of the laws of this state, and by said laws duly authorized to guarantee or insure titles to real property in this state, and no other person, corporation, or institution, may be admitted to the office or position of, and licensed to practice as, an official examiner of title. The court of appeals shall prescribe rules providing for the methods of ascertaining the fitness of individual applicants for license to practice as such examiners, and in doing so, shall take into account the length of time during which applicants have practiced law and the amount of work that they have done in the examination of titles to real property. In the case of experienced examiners of such titles, provision may be made for licensing them, without examination, to practice as "official examiners of title." After complying with the rules and requirements prescribed by the court of appeals pursuant to this section, an individual applicant may be licensed and admitted to practice as an official examiner of title in this state, by an order of the appellate division of the supreme court of the department in which he resides, or in which he has an office for the regular practice of law. He may be required to give such a bond as the court may prescribe. A corporation may be licensed and admitted to practice as an official examiner of title by an order of the appellate division of the supreme court of the department in which it has its principal place of business, which order shall be made on the certificate of the proper state official that such corporation is duly incorporated under and by virtue of the laws of this state, and by said laws authorized to guarantee or insure titles to real property within this state.

Any official examiner of title ¹ may base the ² report and affidavits required by this article, upon searches and abstracts of title made by a corporation duly organized under and by virtue of the laws of this state, and by said laws duly authorized to make and to certify to searches and abstracts of title.³ ⁴ The county clerk in any

¹ Words "in counties not exceeding three hundred thousand inhabitants" omitted.

² Word "report" in place of "certificate."

³ Words "provided, however, that said abstract company shall have been incorporated for a period of at least two years before the passage of this article" omitted.

⁴ Remainder of section new.

county, except in counties having a register, and in such counties the register may designate any deputy register, assistant deputy register or deputy county clerk appointed in his office under any provision of law to act as an official examiner of title in his county, or the county clerk or register may appoint one or more attorneys to act as official examiners of title in his county, provided, however, that any deputy or any other person so designated or appointed shall be an attorney and counselor-at-law and licensed to practice as an official examiner of title. The salaries of the official examiners of title designated or appointed by a county clerk or register, or their additional compensation for acting as official examiners of title beyond the salaries attaching to the office of deputy or assistant deputy, shall be fixed by the county clerk or register and shall be paid in the same manner as in the case of other employees of his office, subject to the audit of the local county or city authorities. The fees for all services rendered by such official examiners so designated or appointed by a county clerk or register shall be received by the county clerk or register and disposed of in the same manner as are other fees received by him.

In case no official examiner of title is designated or appointed in any county, the justice designated by the appellate division to have general supervision and control of the business coming under this article in that county may appoint a competent attorney to act as such official examiner of title upon such terms as may be just and determined by said justice. Any official examiner of title who is an attorney and counselor-at-law shall have power to sit as a referee and may administer oaths and examine witnesses and may at any time apply to the court for directions in any matters concerning his investigations. Said appellate division may advise, admonish, discipline, suspend or remove any official examiner, because of any dishonesty, incompetency, neglect of duty or any other improper conduct or omission, either on its own motion, or on the suggestion or recommendation of the justice of the supreme court having general supervision and control of the business coming under this law in the county in which such official examiner is appointed; and it shall be the duty of said appellate division to co-operate with such justice in endeavoring to retain the highest possible standard of ability, efficiency and honest service for all official examiners acting under and pursuant to this law.

No official examiner who has made the official examiner's report of title to be used in an action for the registration of such title shall act as attorney or counsel in such action, or be otherwise interested in such action.

This section was derived from L. 1908, ch. 444, § 9. It was amended by L. 1916, ch. 547, § 3. The amendments are shown in the footnotes.

Examiners as public officers.—Official examiners of titles are public officers. *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785.

§ 378. What owners may apply; what titles may be registered.

Application for registration of title may be made by the following persons:

First. The person or persons who claim, singly or collectively, to own in fee simple the legal estate in land, or in some right in or over land, and who hold and possess such land or such right.

Second. The person or persons who claim, singly or collectively, to own a contract for the purchase in fee simple of the legal estate in land, or in some right in or over land, from the owner thereof,¹ upon the duly acknowledged consent of the owner of the fee, which consent may be incorporated in the contract. Registration in the name of the holder of the contract shall not be made, except on the production of a proper transfer of title under and pursuant to the contract from a transferrer in possession, or the consent in writing, duly acknowledged, of the proposed vendor in possession and named in the contract and his wife, if he be married. Such transfer or consent may be made after the commencement of the registration proceedings or action.

Third. The person or persons who claim, singly or collectively, to have the power of appointing or disposing in fee simple of the legal estate in land, or in some right in or over land.

No title to a mortgage, lien, trust, charge or estate less than a fee simple shall be registered, unless the title to the legal estate in fee simple in the same property is first registered. When the application is made by the holder of a contract to purchase, it shall refer to the ownership of the proposed vendor, and to the contract of purchase and sale.²

It shall not be an objection to bringing real property under this article that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, trust, charge, or other lien or right. But any such lesser estate, mortgage, trust, charge, or other lien or right shall be duly noted on the certificate of title when issued.

This section was derived from L. 1908, ch. 444, § 10. It was amended by L. 1916, ch. 547, § 3. The amendments are shown in the footnotes.

Who may appear and defend: see *infra*, § 389.

Necessity of possession by plaintiff.—It has been held that this section clearly requires that the plaintiff be in possession of the land as a condition precedent to registering the title. *Eldert v. Cross Country R. Co.*, (1914) 165 App. Div. 917, 150 N. Y. S. 220.

Title by adverse possession.—The fact that one has been in actual, open, and notorious possession of lands for more than twenty years is not alone sufficient to establish a title by adverse possession, as it must be shown in addition that the possession was coupled with a claim of title adverse to the true owner. Thus, a plaintiff in an action to register title could not be

¹ Remainder of subdivision new.

² Following matter omitted: "Registration in the name of the holder of the contract shall not be made, except on the production of a proper transfer of title under and pursuant to the contract, or the consent in writing, duly acknowledged, of the proposed vendor named in the contract and his wife, if he be married. Such transfer or consent may be made after the commencement of the registration proceedings or action."

found to have acquired an absolute fee by adverse possession where the record title was in another, upon mere proof that the owner of record before acquiring title signed a writing stating that, being about to travel, the plaintiff's predecessor should be his lawful heir and owner of the lands in question, with the further proof that the former owner had not been heard from since, while the plaintiff and her predecessor had been in possession for many years and had fenced and improved the land. *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785.

Cited.—This section was cited in *Barkenthien v. People*, (1913) 155 App. Div. 285, 140 N. Y. S. 100, affirmed (1914) 212 N. Y. 36, 105 N. E. 808, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

§ 379. Contents of application for registration; other papers to be filed. The application for registration shall be made by filing a complaint, as required by section three hundred and seventy of this chapter. Except as otherwise specified herein, the complaint (and the summons in the action) shall name as parties to the action all persons having or claiming any right or interest in or lien upon the property, or any part thereof, as shown by the examiner's ¹ report of title hereinafter described; ² the owners in fee simple of the surrounding contiguous properties, so far as they are known or can be reasonably ascertained by inquiry on such property; the people of the state of New York; all persons who have filed any caution or cautions against the registration of such property as provided by section three hundred and eighty-three of this chapter, and such additional parties as may be designated by the court in its order directing the issuance and service of the summons; ³ and it shall further designate and make parties to the action all other possible owners and claimants of the property or any right or interest in or lien upon the property or any part thereof "as all other persons, if any, having any right or interest in, or lien upon, the property affected by this action, or any part thereof." The complaint and summons shall have the forms and effects prescribed for them by the code of civil procedure. The complaint shall set forth, in addition to any other proper allegations:

(a) The name and post-office address of each of the plaintiffs, and when made by one acting in behalf of another, the name, ⁴ place of residence and street number, if any, and post-office address and capacity of the person so acting.

(b) Whether or not each of the plaintiffs (except in case of a corporation) is married, and, if married, the name, ⁴ place of residence and street number, if any, and post-office address of the husband or wife, and, if unmarried, whether he or she has been married, and if he or she has been married, when and how the

¹ Word "report" in place of "certificate."

² Words "the owners in fee simple . . . section three hundred and eighty-three" new.

³ Words "and it shall further designate . . . or any part thereof" new.

⁴ Words "place of residence and street number, if any" new.

marriage relation terminated, and, if the marriage was terminated by annulment or divorce when, where and by what court the annulment or divorce was granted, and for the misconduct, if any, of which party it was granted, ⁵ and the nature of the misconduct, if any, for which it was granted.

(c) That each of the plaintiffs is of the full age of twenty-one years and free from disability, or, if he is a minor or under disability, his age or the nature of such disability, and the authority of the person by whom his application is made.

(d) ⁶ The complaint shall state ⁷ what claim, if any, the state of New York makes to the property in question or what interest, if any, it has therein other than the general governmental interest or such as exists as to all land in private ownership.

(e) A proper reference to the official examiner's ⁸ report of title; and to the survey, map or plan of the property; each of which is to be annexed as an exhibit to the complaint, and made and declared by the complaint to be a part thereof.

(f) ⁹ A statement of the estate, interest or right claimed by the plaintiff in the property sought to be registered.

(g) A prayer that the title be duly registered, as belonging to and vested in the plaintiff or plaintiffs, or as the facts may require at the time of such registration, in the manner set forth in the said ⁸ report of title or otherwise; and that the court may order the issuance of the summons and service of the summons and the proper notice, as hereinafter directed, on all the defendants who do not duly appear in the action.

The court may require additional facts to be stated in the complaint, and may require the filing of any additional paper or evidence. It may also require the complaint to be amended and reverified as the circumstances of the case may demand or make proper.

This section was derived from L. 1908, ch. 444, § 11. It was amended by L. 1910, ch. 627, § 2. This amendment affected subdivision (b) by omitting

⁵ Words "and the nature of the misconduct, if any, for which it was granted" new.

⁶ Following matter omitted: "The names and post-office addresses of the defendants (and whether or not any of them are infants or otherwise incapacitated) as far as known or reasonably ascertainable; a description of those whose names are unknown, as prescribed by section four hundred and fifty-one of the code of civil procedure; and a designation of all other possible owners and claimants of the property or any right or interest in or lien upon the property or any part thereof as 'all other persons, if any, having any right or interest in, or lien upon, the property affected by the action, or any part thereof.' In addition to the defendants above specified, the complaint shall specifically name as defendants the people of the state of New York, and also all persons who have filed any caution or cautions against the registration of such property, as provided for by section three hundred and eighty-three of this chapter."

⁷ Words "at the beginning thereof" omitted.

⁸ Word "report" in place of "certificate."

⁹ Subdivision formerly read: "A statement, when such is the case, that the complaint is made by, or on behalf of, the owner of a contract to purchase said property."

the word "so" which formerly followed the words "she has been married, and if," and inserting in place thereof the words "he or she has been married;" it also affected subdivision (d) by making a change in that part of the subdivision which the amendment by L. 1916, hereinafter specified, omitted and added at the end of the subdivision substantially the same matter contained in subdivision (d) of the text. The section was further amended by L. 1916, ch. 547, § 4, as shown in the footnotes.

When married woman is a party: see Code Civ. Pro., § 450.

When defendant or his name is unknown: see Code Civ. Pro., § 451.

Necessary parties.—A summons in an action to register the title to certain real property, which does not contain the name and holder of the record title, nor the heirs of such persons, if any, is insufficient to sustain the action. *Sherman v. Carman*, (1915) 169 App. Div. 17, 154 N. Y. S. 484; *Belmont Powell Holding Co. v. Serial Building Loan, etc., Inst.*, (1915) 167 App. Div. 124, 152 N. Y. S. 868. The power to register a title which may be conclusive against absent heirs or others having interests in the property should not be permitted to do away with the usual precautions to give notice to such heirs. *Belmont Powell Holding Co. v. Serial Building Loan, etc., Inst.*, (1915) 167 App. Div. 124, 152 N. Y. S. 868. See also *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

Where in an action for the registration of title no persons were originally named as parties defendant, except the People of the State, and "all other persons, if any, who have any right or interest in or lien upon the property affected by this action, or any part thereof," but subsequently other parties were made defendants, who, answering, put in issue the material allegations of the complaint, and specifically pointed out various defects in the title sought to be registered, and it appeared from the official examiner's report that title to certain portions of the property was in persons not specifically named as defendants, and there were no facts stated justifying such omission, it was held that the court had no jurisdiction to direct the commencement of the action to register such title or authorize the issue of the summons, and that a judgment for the plaintiff should be reversed and the proceedings dismissed. *City, etc., Homes Co. v. People*, (1913) 157 App. Div. 459, 142 N. Y. S. 924.

Abutting owner as party defendant.—An abutting owner who has filed the cautionary notice provided for in section 383, *infra*, is a necessary party defendant, specifically to be named, even though he claims no right in or lien on the property; but in the absence of such notice he is not a necessary party. *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68. See also *Hawes v. United States Trust Co.*, (1911) 142 App. Div. 789, 127 N. Y. S. 632; *Marvin Realty Co. v. Barre*, (1910) 142 App. Div. 4, 126 N. Y. S. 483; *Duffy v. Shirden*, (1910) 139 App. Div. 755, 124 N. Y. S. 529.

Owner of party wall as necessary party.—The failure to make an adjoining owner who claimed an easement in a stone retaining wall as a party wall a defendant has been held to be sufficient grounds for a dismissal of the complaint. *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

Form of complaint.—This section enacts that the complaint shall have the form and effects prescribed by the Code of Civil Procedure. It must be a plain and concise statement of the facts constituting the cause of action with a demand for the judgment to which the plaintiff supposes himself entitled. It must allege, in the form stated in the section, the facts which, if true, would entitle the plaintiff, upon compliance with the prescribed procedure and rules, to the judgment of registration. The proofs annexed must establish at the close of a judicial and thorough scrutiny a title in the plaintiff which the statute permits to be registered, and thereupon the summons and notice are issued as the commencement of the action, which thereafter shall be governed by, and shall proceed according to, the laws of this state and the rules of court, relative to such an action, as far as the same are not expressly abrogated or modified by the relevant sections of the statute. *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

Cited.—This section was cited in *Smith v. Martin*, (1910) 69 Misc. 108, 124 N. Y. S. 1064; *Lachman v. People*, (1909) 127 N. Y. S. 912.

§ 380. ¹Official examiner's ²report of title; other evidences of title. The official examiner's ² report of the title referred to in section three hundred and seventy-nine shall accompany the complaint as an exhibit, and be made a part thereof. An individual examiner, who makes the ² report, shall annex thereto his affidavit that the same is true in every particular, to the best of his knowledge and belief, and that he has employed all usual means and methods for ascertaining the truth thereof, and all the facts and circumstances affecting and concerning the title to said property. A corporate official examiner, that makes the ² report, shall annex thereto its policy of guarantee or insurance of the title as shown by the ² report, for an amount to be fixed by it and the plaintiff or plaintiffs, which amount shall not be less than the last valuation of the property or interest insured, for the purpose of local annual taxation, or its proper proportion thereof; which guarantee or insurance shall be made in favor of the plaintiff, and the people of the state of New York, and shall inure to the benefit of, and be recoverable upon, ³by any one who may be injured in any way within ten years after the filing of said policy of guarantee or insurance, because of any error, fraud, omission or misdescription in said ² report. Said official examiner's ² report shall set forth the exact state and condition of the title sought to be registered in the action, and the names, ⁴places of residence with street number if any, and post-office addresses as far as known or reasonably ascertainable, and the rights or interests, or claimed rights or interests, of the plaintiff and all other persons having or claiming any rights or interests in or liens upon said property or any part thereof, and the names, ⁴ places of residence with street number, if any, and post-office addresses of the owners in fee simple of the surrounding contiguous properties, as far as they are known or can be reasonably ascertained by inquiry on said properties; and, as to actual or possible owners or claimants of the property sought to be registered, not known or not found, it shall state fully what search and efforts have been made to find them. All possible owners and claimants of the property sought to be registered, or any right or interest therein or lien thereon, or in or on any part thereof, who cannot be otherwise described, shall be designated in the ² report, and in the summons and complaint, by the expression "all other persons, if any, having any right or interest in, or lien upon, the property affected by this action, or any part thereof." By the statements of fact contained in said ²report of title, or by separate accompanying affidavits, or by any other additional evidence, if necessary, stating the facts, or by

¹ Word "Official" new.

² Word "report" in place of "certificate."

³ Comma followed the word "by" instead of "upon."

⁴ Words "places of residence with street numbers, if any" new.

any or all of these, sufficient facts must be shown to satisfy the court that all owners and claimants of the property sought to be registered, or of any right or interest in or lien upon the same or any part thereof, who could be found by diligent inquiry are duly and specifically named and made parties to the action. The question of the sufficiency of the proof that all such owners and claimants who could be found by diligent inquiry are duly and specifically named and made parties to the action shall be for the court; its decision that such proof is sufficient shall be shown by its making the order for the service of the summons and the commencement of the action as prescribed in this article, and such decision or order shall not be drawn in question after six months from the time when the final judgment in the action is entered. There shall be filed, with said ⁵report of title, the abstract of title ⁶made or used by the official examiner.⁷ The examiner's ⁵report of title shall contain a short form of description of the property, the title to which is sought to be registered, which form is to be used in the notice to accompany and be served with the summons, as provided by section three hundred and eighty-six of this chapter. The court shall approve of such form before it is used in said notice and such approval shall be shown by the making of the order for the service of the summons and notice. Said examiner's ⁵report shall contain, or be accompanied by, any other or further information that the court may prescribe. The first part of said ⁵report shall be a summary of the results thereby shown, which summary shall briefly set forth the exact state of the title to said property. Said ⁵report shall be substantially in the form set out in section four hundred and thirty-four of this chapter, with such additions or modifications as the court may order. ⁸The examiner of title may receive in evidence and may base his report upon any official search or abstract or any search or abstract issued in regular course of business by any corporation duly organized under and by virtue of the laws of this state and by said laws duly authorized to make and to certify to searches and abstracts of title or to guarantee or insure titles to real property in this state. ⁷It shall be the duty of any public official forthwith to certify the returns of any search upon the requisition of any official examiner of title. Where the title to the premises sought to be registered is in whole or in part the same as that of another parcel of land title to which has been registered, reference to the earlier abstract on file in the county in which the complaint is filed may be made by the official examiner in place of duplicating the matters therein contained. Reference to official searches duly filed in the county in which the complaint is filed may be made

⁵ Word "report" in place of "certificate."

⁶ Words "and the searches" omitted.

⁷ Words "in the process of his work of examining the title; also all the other proper evidences of the due examination of the title" omitted.

⁸ Following sentence new.

by the official examiner in place of duplicating the matters therein contained. The papers so referred to shall have the same effect as evidence and proof in the action as said official examiner's report of title, or said searches, as the case may be. Where the complaint seeks registration of a title subject to restrictive covenants or agreements, it shall not be necessary to join as defendants those persons who have or claim rights to enforce such covenants and agreements, but unless such persons are joined as defendants the judgment of registration must direct that title be registered subject to such covenants and agreements.

This section was derived from L. 1908, ch. 444, § 12. It was amended by L. 1910, ch. 627, § 3, which added the words "affected by this action" near the end of the fifth sentence. It also omitted provisions relative to the filing of original muniments of title within the control of the plaintiff and their subsequent withdrawal which were originally included in the eighth sentence; it also added the matter contained in the last three sections of the text. It was further amended by L. 1916, ch. 547, § 4. These amendments are shown in the footnotes.

Power of court to require amendment or modification of examiner's report: see *infra*, § 385.

Necessity as to correctness of report.—Official examiners of titles are public officers and great importance is attached to their reports and abstracts. "It is their duty to state no facts regarding the sufficiency of a title carelessly or without proof of the accuracy of the facts stated." *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785. See also *Lachman v. People*, (1910) 127 N. Y. S. 912; *Partenfelder v. People*, (1913) 157 App. Div. 462, 142 N. Y. S. 915, affirmed (1914) 211 N. Y. 355, 105 N. E. 675; *Eldert v. Cross Country R. Co.*, (1915) 88 Misc. 684, 151 N. Y. S. 441.

Where it appeared from the facts stated in the official examiner's report that plaintiff did not have an estate in fee simple in the property, but that several other persons had or might have some interest therein, and no facts were stated by the plaintiff respecting the existence or nonexistence of such claimants, or showing any effort on his part to obtain information relating to them, it was held that the court had no jurisdiction to make an order for the issuance of a summons in which such claimants were not specifically named or appropriately described. *Partenfelder v. People*, (1913) 157 App. Div. 462, 142 N. Y. S. 915, affirmed (1914) 211 N. Y. 355, 105 N. E. 675. An insufficient report of title cannot be made sufficient by prefixing a statement of the examiner's opinion that the title of the premises sought to be registered is in the plaintiff. The facts, the exact state and condition of the titles, are to be set forth in the examiner's certificate. *Barkenthien v. People*, (1915) 213 N. Y. 554, 107 N. E. 1034; *Eldert v. Cross Country R. Co.*, (1915) 88 Misc. 684, 151 N. Y. S. 441.

Sufficiency of proof.—The provisions of this section that "the question of the sufficiency of the proof that all such owners and claimants who can be found by diligent inquiry are duly and specifically named and made parties to the action shall be for the court," and that "its decision that such proof is sufficient shall be shown by its making the order for the service of the summons and the commencement of the action as prescribed in this article, and such decision or order shall not be drawn in question after six months from the time when the final judgment in the action is entered," do not apply where plaintiff's right to registration is contested and where a final judgment in his favor is before the court for review. *Partenfelder v. People*, (1913) 157 App. Div. 462, 142 N. Y. S. 915, affirmed (1914) 211 N. Y. 355, 105 N. E. 675.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554,

⁹ Word "report" in place of "certificate."

107 N. E. 1034; Hawes v. United States Trust Co., (1911) 142 App. Div. 789, 127 N. Y. S. 632; Marvin Realty Co. v. Barre, (1910) 142 App. Div. 4, 126 N. Y. S. 483; Lachman v. People, (1910) 127 N. Y. S. 912.

§ 381. Survey, map, or plan to be filed. There shall be filed with the complaint and annexed thereto as an exhibit and made a part thereof, the survey, map or plan of the land referred to in section three hundred and seventy-nine of this chapter, which shall be made by a competent surveyor approved by the court, and which shall clearly show the exact boundaries of the land and its connection with the adjacent lands and any adjoining or neighboring streets and avenues,¹ and the distance from such adjoining or neighboring streets or avenues, and all encroachments, if any, and all other facts which are usually shown by accurate surveys. If any adjacent land is already registered, the survey so filed with the complaint must properly connect and harmonize with the survey of such previously registered land. There shall be attached to said survey, map, or plan, and filed with it, an affidavit of the surveyor by whom it was made, that it was made by him personally or under his immediate supervision and direction; that it is a survey, map or plan of the property described in the² official examiner's report of title, and that according to the best of his knowledge and belief said property is included in the boundaries shown on such survey, map or plan, without any encroachments or improper erections, except as follows (stating and describing any encroachments or improper location of buildings, fences or other structures).

This section was derived from L. 1908, ch. 444, § 13. It was amended by L. 1916, ch. 547, § 5. The amendments are shown in the footnotes.

Order to survey realty and authority of surveyor thereunder: see Code Civ. Pro., §§ 1682, 1683, 1684.

Testimony of surveyor and proof of standard of measurement: see Code Civ. Pro., § 841a.

§ 382. Notice of application and of pendency of action. At the time when the application for registration of any property is filed, the plaintiff shall also cause to be filed a notice thereof in the office of the county clerk and registrar of each county where the property is situated, which notice shall be made and filed in the manner prescribed by section sixteen hundred and seventy of the code of civil procedure, and shall be indexed against the names of the plaintiff and all known defendants except the owners of abutting properties, and shall constitute notice of the pendency of the application, and of the action when the same is commenced, and shall be in all other respects the same as a notice of the pendency of an action under sections sixteen hundred and seventy to sixteen hundred and seventy-four inclusive of the code of civil

¹ Words "and the distance from such adjoining or neighborhood streets or avenues" new.

² Words "official examiner's report" in place of "certificate of title of the examiner."

procedure, except that, if the application be dismissed, or the action discontinued, or in any way terminated other than by registration of the title, no order for the cancellation of such notice shall be made by the court until it is duly and fully proved to the court that the provisions of section four hundred and ten of this chapter have been fully complied with and performed. The notice of pendency of action filed with the registrar, as provided in this section, shall also be noted on the "tickler certificate book" as if it were an application, and said notice shall be treated as, and take the place of, the application or complaint in all cases in which this act requires the registrar to deal with the application or complaint. In any place, however, where there is a block or lot system of indexing in use the said notice shall be indexed according to such system. The notice shall be substantially in the form provided by section three hundred and eighty-six of this chapter.

This section was derived from L. 1908, ch. 444, § 14. It was amended by L. 1910, ch. 627, § 4, which added the words "and registrar" to the first sentence, and also added the second sentence. It was further amended by L. 1916, ch. 547, § 6, by which the last two sentences were added.

Index of notice of pendency against abutting owners.—There is no statutory requirement that adjoining owners not shown by the examiner's report of title to have or claim any interest in or lien upon the property shall be made a party defendant, and the notice of pendency is not indexed against abutting owners. *Duffy v. Shirden*, (1910) 139 App. Div. 755, 124 N. Y. S. 529.

§ 383. Filing of caution. Any person claiming to have any right or interest in or lien upon any real property or any part thereof ¹the title to which has not been registered, may file with the registrar a written notice, to be styled a "caution," that he requires written notice to be given to him of any application for the registration of the title of said real property. In such notice he shall show how he claims title, right, interest or lien, and shall give his own ²place of residence with street number, if any, and his post-office address, and that of a person (who may be himself or not), upon whom the notice may be served. In case of any application to register said title, service of such notice shall be made within ten days after the application is filed, by mailing said notice securely inclosed in a post-paid wrapper and directed to the person indicated at the place named. A like cautionary notice may be required by the owner of any land, as to the registration of the title of any or all of the land abutting upon his land, with the like proceedings in all respects. There shall be kept by the registrar a locality index of the cautionary notices, in which the same shall be indexed under the name of the street or road upon which the property referred to in the notice abuts, or if it abuts upon none, under the name of the street or road which is nearest to it. In any place, however, where there is a

¹ Words "the title to which has not been registered" new.

² Words "place of residence with street number, if any" new.

land map ³ dividing the property into ⁴ numbered blocks, the index shall be made by ⁵ block numbers; and ⁶ if any system of indexing by lot numbers is used, the index lot numbers shall be shown. Such caution shall not be notice, except in an action under this article.

. This section was derived from L. 1908, ch. 444, § 15. It was amended by L. 1910, ch. 627, § 5, by which the last sentence was added. It was further amended by L. 1916, ch. 547, § 6. The amendments are shown in the footnotes.

Abutter as necessary party.—An abutting owner of property sought to be registered, who has filed the notice specified in the section, is a necessary party, although he claims no interest in or lien upon the premises. In the absence of such notice he is not a necessary party. *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68. See also *Duffy v. Shirden*, (1910) 139 App. Div. 755, 124 N. Y. S. 529.

Cited.—This section was cited in *Hawes v. United States Trust Co.*, (1911) 142 App. Div. 789, 127 N. Y. S. 632.

§ 384. Agent of nonresident applicant. If the applicant is not a resident of the state, he shall file with his application a paper appointing an agent residing in the state, giving his name in full, place of residence with street number, if any, and post-office address, and shall therein agree that the service of any legal process, in proceedings under or growing out of the application, shall be of the same legal effect, if made on the said agent, as if made on the applicant within the state. If the agent dies, or becomes incapacitated, or removes from the state, the applicant shall forthwith make another appointment; and if he fails to do so within a reasonable time, the court may dismiss the application.

This section was derived from L. 1908, ch. 444, § 16. It was amended by L. 1916, ch. 547, § 7. By this amendment the words "place of residence with street number, if any," were added to the first sentence.

§ 385. Commencement of the action. On the complaint and all the other papers and documents filed in the making of the application for registration, the court shall determine whether or not the plaintiff appears to have a title that should be registered. For the purpose of arriving at such determination, the court may require a further examination of the title, to be made by the¹ examiner² who made the ^{2a}report, or by another official examiner, and it may also require a further or amended survey, or ^{2a}report, or additional affidavits, or any other proper evidence

³ Words "giving sections and" omitted.

⁴ Word "numbered" new.

⁵ Words "section and" omitted.

⁶ Words "if any system of indexing by lot numbers is used, the index lot numbers shall be shown" in place of "as far as convenient, by the lot numbers."

¹ Word "same" omitted.

² Word "has" omitted.

^{2a} Word "report" in place of "certificate."

or proof. In all proceedings subsequent to the determination by the court that the plaintiff appears to have a title that should be registered, the allegations and statements of the examiner's ³ report of title, and of his abstract and searches, and in the survey, shall be prima facie and presumptive evidence of the facts so alleged and stated, and if any defendant controverts any allegation or statement contained in said ³ report of title, abstract, or searches, or survey, the facts controverting such allegation or statement must be specifically pleaded and set forth ⁴ in the answer separate and apart from the denials and allegations answering the complaint, and except as in this section otherwise provided must be established affirmatively by the defendant pleading or setting forth the same. The court may require, at any time, any amendment or modification of said official examiner's ³ report, or any further or amended survey or ³ report, or any additional evidence or proof that may be necessary or proper. All the allegations and statements in said ³ report, abstract, searches and survey shall be taken and construed as statements of fact, unless they are expressly declared therein to be conclusions or opinions. Where a party has controverted in his pleading specifically an allegation or statement contained in said ³ report of title, abstract, searches or survey, any party who has appeared in person, or by attorney or counsel at the trial may require that the ordinary rules of evidence and proof, unaffected by this section, shall apply to the matter so controverted.

When the court is satisfied that the plaintiff appears to have a title that should be registered, it shall make an order directing that the action to register such title be commenced by the issuance of the summons, and the service of the summons and the notice required by section three hundred and eighty-six of this chapter. ⁵ It shall be the duty of the court to make such order whenever it is satisfied that the plaintiff appears to have a title which is, or after proper proceedings in the action can be made free from reasonable doubt; and otherwise it shall be its duty to refuse to make such order. ⁵ No omission or defect in any order directing an action to register a title to be commenced, or in the papers or proceedings upon or in which such order is made, shall deprive the court of jurisdiction to make such order, or of jurisdiction in the action, or in any way affect the court's jurisdiction. The summons "shall name as defendants the persons so named in the title of the action as set forth in the order directing the commencement of the action and shall be made and have the form, and it and said notice shall be served in the manner prescribed

³ Word "report" in place of "certificate."

⁴ Words "in the answer separate and apart from the denials and allegations answering the complaint" new.

⁵ Following sentence new.

⁶ Words "shall name as defendants . . . commencement of the action and," new.

by the code of civil procedure for a summons in an action in the supreme court; except that, when service is directed to be made by publication, it shall be ordered to be made in only one newspaper designated by the court once a week for four successive weeks, and such service so made shall be complete at the end of twenty-eight days from and including the day of the first publication; and except further that any defendant on whom personal service is made without the state pursuant to such an order shall appear, answer, or demur within twenty-eight days after such personal service; and except further that an order for service of the summons and said notice shall be a court order, and the summons served pursuant thereto need not be accompanied by any notice except that prescribed and required by section three hundred and eighty-six of this chapter; and except further as otherwise provided herein. Before making an order for service of the summons and said notice by publication or other form of substituted service, the court must be satisfied by proof of the facts that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons. The question of the sufficiency of such proof shall be for the court; and an allegation, in an affidavit or other duly verified statement recited in said order, that the plaintiff has been or will be unable with due diligence to make personal service of the summons, or that after diligent inquiry a defendant remains unknown to the plaintiff or that the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state,⁷ or that the plaintiff cannot, with reasonable diligence, ascertain a place or places where the defendant would probably receive matter transmitted through the post-office, may be taken to be sufficient proof thereof. An order containing such a recital, and made on such proof, shall not be drawn in question after six months from the time when the final judgment in the action is entered.⁸ The summons and such notice, the complaint, the official examiner's report of title and the abstract shall be served on the people of the state of New York; and such service may be made by mailing a copy of such summons and notice together with a copy of the complaint and of the official examiner's report of title and abstract securely inclosed in a postpaid wrapper and directed to the attorney-general of the state of New York.⁹ Upon

⁷ Words "or that the plaintiff . . . transmitted through the post-office" new.

⁸ Words "The summons . . . report of title and abstract" substituted for, "Service of the summons and said notice on the people of the state of New York shall be sufficiently made, by mailing a copy thereof, together with a copy of the complaint (but not of the official examiner's certificate of title or abstract or other papers filed with the complaint and application)."

⁹ The remainder of the section formerly read, "The attorney-general may require the service also of a copy of the official examiner's certificate of title and of the abstract of title. Upon and after the issuance of the summons, the court's jurisdiction shall be the same as in an action in the

and after the issuance of the summons, the court's jurisdiction shall be the same as in an action in the supreme court in which no order for the commencement of the action is required; and the action shall be governed by, and shall proceed according to, the laws of this state and the rules of court, relative to such an action, as far as the same are not expressly abrogated or modified by this article.

This section was derived from L. 1908, ch. 444, § 17. It was amended by L. 1910, ch. 627, § 6. This amendment omitted the words "with the registrar" which formerly came between the words "papers and documents filed" and "in the making of the application." It also added the matter beginning with the third sentence and ending with the first paragraph in the section, except the changes made therein by the amendments of L. 1916, ch. 547, § 8, and given in the footnote. It also changed, by the addition of certain requirements, the provisions relating to service of summons and notice on the people of the state, and added a provision that the attorney-general could require service of a copy of the official examiner's certificate of title and of the abstract of title. It also amended the last sentence of the section which formerly read: "The action shall be governed by, and shall proceed according to, the laws of this state and the rules of court, relative to an action in the supreme court, as far as the same are applicable and are not abrogated or modified by this article." It was further amended by L. 1916, ch. 547, § 8. The amendments are shown in the footnotes.

Duty of court.—Upon an application for an order directing the commencement of an action to register a title a duty is imposed on the court at the outset to examine the complaint and certificate, so that it may be satisfied that the papers conform to the statute and that there is at least *prima facie* proof that the plaintiff has title. *Lachman v. People*, (1909) 127 N. Y. S. 912. And an order directing that an action to register a title be commenced by the issuance and service of the summons should not be made by the court unless facts are shown to the court, which at least uncontradicted and unexplained show a good title in the claimant as against all the world. Where the plaintiff rests his case upon the complaint and accompanying papers and they do not show a title good as against all the world, the action should be dismissed upon motion of the defendant. *Partenfelder v. People*, (1914) 211 N. Y. 355, 105 N. E. 675, affirming 157 App. Div. 462, 142 N. Y. S. 915.

"It is particularly important that before authorizing the commencement of an action the court should see to it that every possible owner or claimant to the property, whose name and address are known or readily ascertainable, and every such class of owners or claimants whose names are unknown but who can be described and designated, shall be specifically named in the complaint and the summons, or properly designated therein, and shall be personally served with said summons, unless the court is satisfied by proof of the facts that the plaintiff has been or will be unable with due diligence to make personal service thereof." *Partenfelder v. People*, (1913) 157 App. Div. 462, 142 N. Y. S. 915, affirmed (1914) 211 N. Y. 355, 105 N. E. 675.

Examiner's report as evidence.—And when the plaintiff has complied with the statute and set forth the facts relied upon to establish his title, he cannot be put to the trouble of proving them on the trial by the original documents, records or other evidence, but the examiner's report of title, the abstract, searches and survey are presumptive evidence of them, except that any party appearing at the trial may require that the ordinary rules of evidence and proof, unaffected by this section, shall be applied to the matter specifically controverted. *Barkenthien v. People*, (1915) 213 N. Y. 554, 107 N. E. 1034. While the official examiner's report and abstract of title are *prima facie* evidence, sufficient, if satisfactory, to justify the

Supreme Court in which no order for the commencement of the action is required; and the action shall be governed by, and shall proceed according to, the laws of this state and the rules of court, relative to such an action, as far as the same are not expressly abrogated or modified by this article."

court in ordering the issuance of the summons, they are not made evidence of title on the trial or hearing in court or before a referee to establish title. On the trial or hearing the same rules of evidence apply as in actions of trespass or ejectment where title is in issue. Abstracts of title or certificates of title companies have never been received in evidence; but the deeds or the records, judgment rolls, and the like have always been offered to prove and establish the chain of title. *Voorhies v. Voorhies*, (1910) 66 Misc. 78, 120 N. Y. S. 677.

Right of defendant to demur.—If a property owner in an action to register title makes a person having no interest in the subject matter and not a necessary party under the statutory requirements a party defendant, he does so at his peril. So, if his complaint alleges no facts constituting a cause of action against such party it is as to him demurrable, if a demurrer is authorized or can be made available. This section should not be so construed as to deprive a party, even though improperly joined in the action, of the right to demur. *Duffy v. Shirden*, (1910) 139 App. Div. 755, 124 N. Y. S. 529.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034; *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68; *Smith v. Martin*, (1910) 69 Misc. 108, 124 N. Y. S. 1064, judgment modified 142 App. Div. 60, 126 N. Y. S. 877.

§ 386. Notice of object of action; copy of complaint. The summons, however served, shall be accompanied by a notice of object of action,¹ which shall state the object of the action and describe briefly, but plainly, the property, the title to which is sought to be registered. Said notice shall be approved by the court, and a copy thereof shall be annexed to the order directing the service of the summons and said notice. Said notice shall be substantially² as follows: "The object of this action is to register and confirm the title of (name or names and place of residence with street number, if any,³ and post-office address of plaintiff in full) in the following described property (description as approved by the court)." A copy of the complaint, but not of the official examiner's report⁴ of title or abstract or other papers filed with the complaint and application, may be demanded by the attorney of any defendant, and if so demanded must be served, as prescribed by⁵ the code of civil procedure.

This section was derived from L. 1908, ch. 444, § 18. It was amended by L. 1910, ch. 627, § 7. This amendment added after the words "a copy of the complaint" the following: "but not of the official examiner's certificate of title or abstract or other papers filed with the complaint and application." The section was further amended by L. 1916, ch. 547, § 8. The amendments are shown in the footnotes.

Procedure.—Under section 385, supra, and this section, it seems that, except as otherwise specifically provided, the procedure is similar to that of an ordinary action in the Supreme Court. *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68.

¹ Words "of object of action" added.

² Word "substantially" added.

³ Words "and place of residence with street number, if any," added.

⁴ Word "report" substituted for word "certificate."

⁵ Words "section four hundred and seventy-nine of" omitted.

§ 387. **Summons and notice to be posted on the land.** A copy of the summons and notice of object of action, as above described, shall be posted in a conspicuous place on each parcel of land included in the action, at least forty days before application is made for judgment in the action. The affidavit of the person by whom such posting is made shall be ¹ proof that such notice was posted in a conspicuous place, and shall be filed with the application for the judgment or before the judgment is entered.

This section was derived from L. 1908, ch. 444, § 19. It was amended by L. 1910, ch. 627, § 8. The amendment is shown in the footnote.

§ 388. **Guardian ad litem.** In every action to register title, the court shall make an order appointing a disinterested attorney, other than the official examiner by whom the title was examined and reported and certified, to act as guardian ad litem for all minor parties to the action and for all other parties under disability. The application for the appointment of said guardian may be made by the plaintiff ex parte at any time after the time to answer of such of the defendants as are served personally has expired, and the service of the summons upon such of the defendants as are not served personally within this state is complete.

The guardian ad litem thus appointed upon the application of the plaintiff shall be the attorney-general of the state of New York, unless it appears to the court that the state of New York has or claims some interest adverse to that of the person or persons for whom the attorney-general would thus be appointed guardian ad item. The question as to the existence of such adverse claim or interest shall be for the court; and an order appointing the attorney-general as such guardian ad litem shall be sufficient proof that no such adverse claim or interest exists. Such an order shall not be drawn in question after six months from the time when the final judgment in action is entered. It shall be the duty of any such guardian ad litem actively to ascertain and protect as far as is reasonably possible, the interests of all minor parties to the action and all other parties under disability. The compensation of such guardian shall be fifteen dollars, unless the court direct otherwise; but the attorney-general shall not receive any compensation for acting as such guardian ad litem. Any other guardian ad litem may also be appointed in the manner set forth in the code of civil procedure for any of the defendants who are infants or persons incapacitated.

This section was added by L. 1910, ch. 627, § 9. It was amended by L. 1916, ch. 547, § 8. The amendments consisted in adding sentences 3, 4 and 5, and the words in sentence 7, following the semicolon. Former section 388 was repealed by L. 1910, ch. 627, § 9. It was derived from L. 1908, ch. 444, § 20, and related to the same subject, namely, guardians ad litem.

Appointment of guardian for infant defendant: see Code Civ. Pro., § 471 et seq.

¹ Word "conclusive" omitted.

§ 389. Any person interested may appear and defend. Any person interested in the property, or whose interests may be affected by the judgment in the action, whether specifically named as defendant or not, may enter his appearance and answer the complaint, within the time allowed by this article, or such further time as shall be allowed by the court, and may oppose the application for registration of the property as belonging to the plaintiff, or set up a cross-demand to have the title registered in his own behalf. In either case, he shall state particularly what his interest is and answer the material allegations of the complaint.

This section was derived from L. 1908, ch. 444, § 21.

What owners may apply for registration: see *supra*, § 378.

People as defendant.—The provisions of the section are applicable to the People, and authorize them to appear and answer the complaint and oppose the application for registration or set up a cross-demand to have the title registered in their own behalf. *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034. And as the People have an interest to see that imperfect titles are not registered, it is not only the right but the duty of the attorney-general in the protection of that interest to insist in each case that proper proof of title be made, acting in effect as *amicus curiæ*. *Meighan v. Rohe*, (1915) 166 App. Div. 175, 151 N. Y. S. 785.

Holder of mortgage as party defendant.—A party who alleges that he has a mortgage affecting the property sought to be registered is a proper defendant. *Partenfelder v. People*, (1914) 211 N. Y. 355, 105 N. E. 675, affirming 157 App. Div. 461, 142 N. Y. S. 915.

Owner of easement as defendant.—Where an appellant claims an easement in part of the plaintiff's premises he has an absolute right to appear and have such easement, if established, preserved by the judgment. *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11; *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68.

Abutting owner as defendant.—A person is not a proper defendant whose rights are in no way affected or who has not asserted any interest pursuant to the requirements of this section, but who is brought in for the reason that he is the owner of surrounding contiguous property referred to in section 380, *supra*. *Marvin Realty Co. v. Barre*, (1910) 142 App. Div. 4, 126 N. Y. S. 483. See also *Hawes v. United States Trust Co.*, (1911) 142 App. Div. 789, 127 N. Y. S. 632; *Duffy v. Shirden*, (1910) 139 App. Div. 755, 124 N. Y. S. 529.

Form of denial.—A defendant cannot put all the facts in issue by the ordinary general denial, but must specify the particular statement or statements which he intends to controvert and state what he claims the fact to be. *Barkenthien v. People*, (1915) 213 N. Y. 554, 107 N. E. 1034.

§ 390. Title in lands vested; clouds thereon removed. In any action under this article, the court may find and decree in whom the title to or any right or interest in the property or any part thereof is vested, whether in the plaintiff or in any other person, and may remove clouds from the title, and may determine whether or not the same is subject to any lien or incumbrance, estate, right, trust or interest, and may declare and fix the same, and may direct the registrar to register such title, right, or interest, and in case the same is subject to any lien incumbrance, estate, trust or interest, may give directions as to the manner and order in which the same shall appear upon the certificate of title to

be issued by the registrar, and generally in such an action, the court may make any and all such orders and directions as shall be according to equity in the premises and in conformity to the principles of this article. But no judgment of registration of a title shall be made or entered until proof is duly made in the action by the report of an official examiner and by the certificate or receipt of the officer entitled to collect the taxes, assessments or water rents, and all taxes, water rents and assessments on the property, right or interest the title to which is so registered, have been fully paid and discharged, unless the court directs the title to be registered subject to any such tax, water rent or assessment, which said tax, water rent or assessment must then be noted on the certificate of title. Where the title to be registered is subject to restrictive covenants or agreements, and it shall appear to the court either that said restrictive covenants or agreements have been violated or that by reason of the proper parties not having been joined the court should not proceed to determine whether said restrictive covenants or agreements have or have not been violated, then in either case title may nevertheless be registered; but the judgment of registration must direct the registration to be "subject to any question as to whether covenants (specifying them) have been violated," and the certificate of title shall so note; and then the rights in respect to such covenants of any person interested therein shall not be affected by such judgment or registration. When the land the title to which is to be registered abuts upon any street, avenue, road or way the judgment of registration may provide for the registration of the applicant's interests or rights in and to such street, avenue, road or way; but if such judgment fail so to provide, then the interests or rights of the applicant in such street, avenue, road or way shall become and be parcel of or appurtenant to the property registered, and shall be included in any conveyance of or incumbrance or lien upon such registered property, unless it is expressly reserved in or excepted from such conveyance, incumbrance or lien. Such express reservation or exception shall be affected only by a clause directly reserving or excepting such interests or rights in such street, avenue, road or way and shall not be implied from the language used in any description of the registered property subsequent to the initial registration thereof.

This section was derived from L. 1908, ch. 444, § 22, and as incorporated in the Consolidated Laws read as follows: "§ 390. Title in lands vested; clouds thereon removed. In any action under this article, the court may find and decree in whom the title to or any right or interest in the property or any part thereof is vested, whether in the plaintiff or in any other person, and may remove clouds from the title, and may determine whether or not the same is subject to any lien or incumbrance, estate, right, trust or interest, and may declare and fix the same, and may direct the registrar to register such title, right, or interest, and in case the same is subject to any lien, incumbrance, estate, trust or interest, may give directions as to the manner and order in which the same shall appear upon the certificate

of title to be issued by the registrar, and generally in such an action, the court may make any and all such orders and directions as shall be according to equity in the premises and in conformity to the principles of this article. But no judgment of registration of a title shall be made or entered until proof is duly made in the action that all taxes, water rents and assessments on the property, right or interest the title to which is so registered, have been fully paid and discharged, unless the court directs the title to be registered subject to any such tax, water rent or assessment, which said tax, water rent or assessment must then be noted on the certificate of registration." It was amended by L. 1910, ch. 627, § 10, and L. 1916, ch. 547, § 8. The changes made by the amendment of 1910 were the addition of the third sentence and the words "by the certificate . . . or water rents" in the second sentence. The other changes were made by the amendment of 1916.

Removal of cloud on title.—In an action under the statute an apparent cloud on the title may be removed, but a valid lien on or legal claim to the property cannot be extinguished or destroyed. *Sherman v. Carman*, (1915) 169 App. Div. 17, 154 N. Y. S. 484.

Dismissal of complaint where record shows title in plaintiff.—Under this section the court may decree in whom the title to, or any right or interest in the property, or any part thereof, is vested. It is therefore error for the Appellate Division to dismiss the complaint where the trial court might find from the record that the plaintiff has a marketable title to a portion of the land the title to which is sought to be registered. *Meighan v. Rohe*, (1915) 216 N. Y. 677, 110 N. E. 165, modifying 166 App. Div. 175, 151 N. Y. S. 785.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100.

§ 391. Judgments and orders conclusive. No judgment of registration shall be made, unless the court is satisfied that the title to be registered accordingly is free from reasonable doubt. The judgment and any order made and entered in an action under this act shall, except as herein otherwise provided, be forever binding and conclusive upon the state of New York and all persons in the world, whether mentioned and served with the summons and said notice specifically by name, or included in the description, "all other persons, if any, having any right or interest in or lien upon, the property¹ affected by this action, or any part thereof." It shall not be an exception to such conclusiveness that any such person is an infant, lunatic or is under any other disability or is not yet in being.

This section was derived from L. 1908, ch. 444, § 23. It was amended by L. 1910, ch. 627, § 11. The amendment is shown in the footnote.

Effect of judgment.—"The purpose of this statute is to create a judgment in rem perpetually conclusive. Other proceedings in rem may determine the status of a ship or other chattel that is transient; this legislation provides for a decree that shall conclude the title to an interest that is to be as lasting as the land itself." *Smith v. Martin*, (1910) 69 Misc. 108, 124 N. Y. S. 1064. See also *Sundermann v. People*, (1911) 148 App. Div. 124, 132 N. Y. S. 68. The binding and conclusive character of the judgment is dependent upon the state of New York, and all persons in the world interested therein having by due process of law severally had an opportunity to be heard in determining what, if any, judgment should be entered in the action. A judgment of a court having jurisdiction of the subject matter is of course binding and conclusive upon all persons of whom the court obtains jurisdiction. It is not binding and controlling upon others, neither is a party to an action to register a title who has or claims a right or lien upon

¹ Words "affected by this action," added.

some part of the property sought to be registered required silently to permit judgment to be entered upon the complaint and the papers mentioned therein, if admitting all the statements therein contained judgment should not be entered thereon. If the plaintiff rests his case upon the complaint and accompanying papers and they do not show a title good as against all the world the action should be dismissed upon a defendant's motion. *Partenfelder v. People*, (1914) 211 N. Y. 355, 105 N. E. 675, affirming 157 App. Div. 462, 142 N. Y. S. 915.

Judgment on decision of referee.—Although the section provides that “no judgment of registration shall be made, unless the court is satisfied that the title to be registered accordingly is free from reasonable doubt,” this does not mean necessarily that the court itself must determine the issues raised by the pleadings, for section 371 provides that the issues shall be tried by the court or a referee. Hence, where the issues in an action to register title to real property have been referred to an official referee “to hear and determine” a judgment may be entered on his decision. *Jamieson, etc., Co. v. Reynolds*, (1915) 169 App. Div. 107, 154 N. Y. S. 836.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034; *Sherman v. Carman*, (1915) 169 App. Div. 17, 154 N. Y. S. 484; *Hawes v. United States Trust Co.*, (1911) 142 App. Div. 789, 127 N. Y. S. 632; *Voorhies v. Voorhies*, (1910) 66 Misc. 78, 120 N. Y. S. 677.

§ 392. Fraud; action to set aside the judgment or to recover the property. Any title registration procured by or as the result of fraud may be set aside, in the same manner and by the same proceedings as in case of a deed obtained by fraud, provided that such proceeding for setting aside the registration shall not injuriously affect the rights of an innocent purchaser or incumbrancer of the property after such registration, for value and without actual notice of the fraud, and provided further that the action or other proceeding to set aside such registration be commenced within ten years from the time when the final judgment of registration was entered. No action or proceeding shall lie or be commenced, except on the ground of fraud as above stated, to set aside any judgment of registration or to modify or affect the same or for the recovery of registered property or any estate, right or interest in or lien upon the same or any part thereof, or make any entry thereon, adversely to the title or interest registered therein, as directed by a final judgment of the court, unless such action or proceeding is commenced within six months after such judgment of registration is entered.

This section was derived from L. 1908, ch. 444, § 24.

Cited.—This section was cited in *Hawes v. Clark*, (1912) 136 N. Y. S. 188.

§ 393. Registration of title. Upon entering final judgment, a judgment roll must be prepared and filed in the office of the clerk, as provided by the code of civil procedure. The clerk upon payment of a fee of one dollar shall cause a copy of said judgment to be certified and transferred to the “registrar” of his county, who shall forthwith file the same in his office. After the certified copy of the final judgment directing registration of title is duly filed in

the registrar's office, the registrar shall proceed to register the title to the real property, estate, right, or interest, pursuant thereto, and issue a certificate or certificates thereof and enter the same as herein prescribed.

This section was derived from L. 1908, ch. 444, § 25. As incorporated in the Consolidated Laws it read as follows: "§ 393. Registration of title. After the final judgment directing registration of title is duly entered and filed in the registrar's office, the registrar shall proceed to register the title to the real property, estate, right, or interest, pursuant thereto, and issue a certificate or certificates thereof and enter the same as herein prescribed." It was materially amended by L. 1910, ch. 627, § 12; and again amended by L. 1916, ch. 547, § 8. The only change made by the latter amendment was the elimination of the words "sections one thousand two hundred and thirty-seven and one thousand two hundred and thirty-eight of" which in the amendment of 1910 followed the words "as provided by" in the first sentence.

§ 394. Certificate of title.¹ The registrar shall make, in the form prescribed by section four hundred and thirty-five of this chapter an original certificate of title¹ of every title, right or interest registered by him pursuant to this article. Said certificate shall bear the date of its issue (the day and year), and and be under the hand and official seal of the registrar, and be numbered in the order of its issue. Except in case of a corporation, it shall state whether the owner of the property, right, or interest registered is married or unmarried, and if married, the name of the husband or wife. If the owner is a minor, it shall state his age; if he is under any other disability, it shall state the nature of such disability. The registrar shall make proper memorials or notations on the certificate, showing in such manner as to set forth and preserve their priorities, the particulars of all the estates, mortgages, trusts, liens and charges, to which such owner's title is subject. No such memorial or notation shall be more than one folio (one hundred words), in length; but it may refer to covenants, restrictions, trusts² and forms recorded in the "book of covenants, restrictions, trusts² and forms" provided for by this article. The form of the first certificate of title, as set forth in section four hundred and thirty-five of this article, shall be subject to such changes as may be required in any case. All subsequent certificates shall be in like form, except that in place of the words "first certificate," et cetera, shall be the words "transfer from number" (the number of the next previous certificate); also the words "first registered" (date of first registration). On the back or reverse side of every certificate shall be printed, in plain legible type, the whole of section four hundred of this chapter.

This section was derived from L. 1908, ch. 444, § 26. It was amended by L. 1916, ch. 547, § 9. The amendments are shown in the footnotes.

False certificates: see PENAL LAW, §§ 1861, 1874.

¹ Word "title" substituted for "registration."

² Word "trusts" added.

§ 395. **Title¹ book.** The registrar shall keep a book or books to be known respectively as the "title¹ book," wherein he shall enter all first and subsequent "original" certificates of title by binding or recording them therein, with appropriate blanks for the entry of memorials and notations prescribed by this article. Said book shall be of about the size of the conveyance books, now used in county clerks' and registers' offices. Each certificate shall constitute a separate leaf of such book. About two inches of each leaf on the binding edge shall be kept blank on both sides, to facilitate rebinding. At such times as may be proper, the registrar may rebind the certificates in new volumes or title books, containing respectively cancelled and uncanceled certificates. All memorials and notations, that may be entered in the title book under the terms of this article, shall be entered upon the leaf constituting the last certificate of title of the property to which they relate. Whenever the term "certificate of title" is used in this article it shall be deemed as including all memorials or notations thereupon noted.

This section was derived from L. 1908, ch. 444, § 27. It was amended by L. 1916, ch. 547, § 9. The amendment is shown in the footnote.

§ 396. **Duplicate certificate of title.** The registrar shall, at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations thereon noted, which shall be delivered to the owner and shall be known as the owner's duplicate. Any duplicate certificate, or certified copy of a certificate, shall be plainly stamped as such across its face.

This section was derived from L. 1908, ch. 444, § 28.

Loss of owner's duplicate: see *infra*, § 414.

§ 397. **Owner's receipt for certificate of title.** For the purpose of preserving evidence of the handwriting of the owner of any registered property, right, or interest, it shall be the duty of the registrar to take from such owner, in every case where it is practicable so to do, his receipt for the certificate of title, or whatever paper shall be issued to him, signed by such owner in person. When such receipt is signed in the registrar's office it may be witnessed by the registrar or some deputy. If signed elsewhere, it may be acknowledged before any officer authorized to take acknowledgment of deeds. When so signed and witnessed or acknowledged, such receipt shall be *prima facie* evidence of the genuineness of such signature.

This section was derived from L. 1908, ch. 444, § 29.

Who may take acknowledgment of deeds: see *supra*, § 298.

Proof of instrument by submitting disputed and genuine handwriting: see Code Civ. Pro., § 961d.

¹ Word "title" substituted for "registration."

§ 398. Certificate to include dealings pending registration. In every case of initial registration, the certificate of title shall include all dealings with the real property, and all statutory or other liens filed against the same, subsequent to the filing of the application, except when they are modified or set aside by a judgment, decree or order of the court. On and after the filing with the registrar of the notice of application for the registration of any real property, and until the same is registered, or the application is denied, dismissed, or discontinued, all papers which are required or permitted by this article to be filed against registered property, except the papers in the action, shall be filed with the registrar as if the property were registered.

This section was derived from L. 1908, ch. 444, § 30. It was materially amended by L. 1910, ch. 627, § 13, as to the second sentence, which formerly read as follows: "On and after the filing with the registrar of an application for the registration of any real property, and until the same is registered or the application is denied, dismissed, or discontinued, all papers which are required or permitted by this article to be filed against registered property shall be filed with the registrar as if the property were registered."

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 399. Certificate of title as evidence. The certificate of title, and any copy thereof duly certified under the hand and seal of the registrar and the owner's duplicate certificate, until the expiration of the time herein limited to bring an action or proceeding to set aside the judgment of registration shall be received as evidence in all the courts of the state, and in all courts and places shall be prima facie evidence that the provisions of law up to the time of issue of such certificate or duplicate, or of the time of entry of the last memorial thereon, have been complied with, and that such certificate of title has been issued in compliance with a valid judgment, and that the title to the property is as therein stated; and after the expiration of such time limited for bringing said proceedings to set aside said judgment, such certificate or copy, up to the time of its issue, shall be so received as evidence in all courts of the state, and shall be conclusive evidence of the same facts. Every memorial or notation or cancellation thereof made on any certificate or duplicate or copy thereof shall be signed by the registrar or his deputy or his duly authorized deputy or clerk.

This section was derived from L. 1908, ch. 444, § 31. It was amended by L. 1916, ch. 547, § 9, by substituting the words "certificate of title" for "registration certificate of the title" in the first sentence.

Documentary evidence generally: see Code Civ. Pro., § 921 et seq.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

§ 400. Rights of owners of registered property; exceptions; incumbrances and transfers to be filed. A person who receives a

certificate of title pursuant to a judgment of registration, except in case of fraud to which he is a party, and a purchaser of registered real property, who takes a certificate of title for value and in good faith, shall hold the same free from all incumbrances, charges, trusts, liens and transfers, except those noted on the certificate in the registrar's office, and any of the following which may exist:

First. Liens, claims, or rights arising or existing under the laws or constitution of the United States, which the statutes of this state do not require to appear of record;

Second. Any tax, water rate, or assessment which becomes a lien on the property after initial registration and for which a sale has not been made;

Third. Any lease or agreement for a lease, made after or pending registration, for a period not exceeding one year, where there is actual occupation of the land under the lease or agreement;

Fourth. Easements or servitudes which accrue against the property after initial registration in such manner as not to require their registration.

Except as specified in the foregoing statement of exceptions, no incumbrance, charge, trust, lien, or transfer shall take effect upon or over real property the title to which has been registered, unless the instrument creating and setting forth such incumbrance, charge, trust, lien, or transfer has been filed with the registrar and a memorial or notation thereof made upon the certificate of title covering the property.

This section was derived from L. 1908, ch. 444, § 32. It was amended by L. 1916, ch. 547, § 9, by substituting the words "owners of registered property" for "registered owners" in the title.

Maintenance of telegraph or other electric wires as raising presumption of grant: see *supra*, § 261.

Cited.—This section was cited in *Barkenthien v. People*, (1914) 212 N. Y. 36, 105 N. E. 808, affirming 155 App. Div. 285, 140 N. Y. S. 100, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034; *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 401. Registered property not affected by prescription or adverse possession. No title to registered real property, in derogation of that of the registered owner, shall be acquired by prescription or adverse possession.

This section was derived from L. 1908, ch. 444, § 33.

Adverse possession generally: see Code Civ. Pro., § 368 et seq.

§ 402. Fraud; notice only by registration. Except in case of fraud and except also as herein otherwise provided, no person taking a transfer of any registered real property or of any estate or interest therein or lien or charge thereon from the registered owner shall be required to inquire into the circumstances under

which, or the consideration for which such owner or any previously registered owner had the title registered, nor shall such transferee be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest whatever; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed or treated as fraud.

This section was derived from L. 1908, ch. 444, § 34.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 403. Memorial to be carried forward. Whenever a memorial or notation has been entered as permitted by this article, the registrar shall carry the same forward upon all certificates of title until the same is cancelled in some manner authorized by this article.

This section was derived from L. 1908, ch. 444, § 35.

§ 404. Registered property to remain registered. The bringing of property under this article shall imply an agreement, running with the land and binding upon the applicant and all his successors in interest or title, that the property shall be subject to the terms of this article, and all amendments and alterations thereof, and all dealings with the property so registered, or any estate, right or interest therein, after the same has been brought under this article, and all liens, incumbrances and charges upon the same after the first registration thereof shall be subject to the terms of this article.

This section was derived from L. 1908, ch. 444, § 36. It was repealed by L. 1910, ch. 627, § 14, and a new section inserted, but by L. 1916, ch. 547, § 9, that section was amended to read as the repealed section read.

§ 405. Registered property subject to same rights and burdens as unregistered property. Registered real property and every estate, right and interest therein shall be in all respects subject to the same rights, burdens and incidents as unregistered real property, except as otherwise expressly provided in this article or any amendment thereof.

This section was derived from L. 1908, ch. 444, § 37.

§ 406. Transfers of registered property. A registered owner of real property, in order to transfer his whole estate or interest therein or any part or parcel thereof, or any undivided interest therein shall execute to the intended transferee a deed or instrument of conveyance in any form authorized by law. Upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, if the interested parties agree in a statement as to the nature and effect of the transfer the registrar shall enter such statement as a

memorial upon the proper original certificate, provided that such statement is not more than one folio (one hundred words) in length. He shall then make out and register as herein provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the property conveyed to the transferee and shall enter upon the original and duplicate certificate the date of the transfer, the name of the transferee and the number of the new certificate, and shall stamp across the original and surrendered duplicate certificates the word "cancelled." If the parties in interest fail to agree upon the statement to be entered upon the certificates, the registrar shall refuse to make the transfer until directed by the court as herein provided. Title to such property shall not pass by such transfer until the transfer is registered as prescribed by this section. Any instrument of transfer or mortgage of an estate in fee simple in registered property shall contain an express statement, after the description of the grantor or grantors, mortgagor or mortgagors, as to whether or not such party or parties are married or unmarried; and no instrument of transfer or mortgage which does not contain such statement shall be registered.

This section was derived from L. 1908, ch. 444, § 38. It was amended by L. 1910, ch. 627, § 15, by adding the last sentence.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 407. Certificate as to part of property remaining after transfer. When only a part of the property described in a certificate is transferred, or some estate or interest therein is to remain the transferer's, a new certificate shall be issued for such part, estate or interest so remaining and belonging to him; or if the property is so described as to permit it, the property transferred may be cancelled on the certificate of the transferer without the issue of a new certificate for the residue.

This section was derived from L. 1908, ch. 444, § 39. It was amended by L. 1916, ch. 547, § 9. The change effected by the amendment was in the title, which formerly read as follows: "Certificate remaining part of property transferred."

§ 408. Book of covenants, restrictions, trusts¹ and forms. Each registrar shall provide a book to be known as the book of covenants, restrictions, trusts¹ and forms. This book shall be bound in a substantial manner and the pages thereof shall be Crane's parchment paper or its equal. Any person may have recorded in this book any covenant, restriction, trust¹ or form he may present for that purpose on payment to the registrar at the rate of fifty cents per folio. The covenant, restriction, trust¹ and form so entered shall be numbered consecutively and shall be written or typewritten in the book with India ink or other permanent ink in a clear and legible manner under the number

¹ Word "trusts" added.

given to it. References in any documents issued by the registrar to any covenant, restriction, trust¹ or form recorded in this manner shall be as follows:

Subject to restriction, (or covenant, trust or form) recorded under number in the book of covenants, restrictions, trusts¹ and forms, in the registrar's office of this county.

This section was derived from L. 1908, ch. 444, § 40. It was amended by L. 1916, ch. 547, § 9. The amendments are shown in the footnote.

Penalty for using long form of covenants: see supra, § 327.

§ 409. Filing, entering and indexing papers pursuant to this act; tickler certificate. Every paper filed with the registrar shall be given a serial number in the order of its filing, and then shall be entered by the registrar in an "entry book" under columns showing:

First. The serial number;

Second. Day of filing;

Third. Filing number of application (complaint) to which it relates if the registration proceedings are still pending;

Fourth. Certificate number, if registration proceedings are completed and certificate has been issued;

Fifth. Kind of paper filed;

Sixth. Names, place of residence with street number, if any, and post-office address of the person in whose interest the paper is filed.

Every paper filed with the registrar affecting property for which registration proceedings are pending shall be kept by the registrar with the application. The registrar shall provide a book to be known as "the tickler certificate book" wherein he shall note all filed papers affecting property for which registration proceedings are pending. Each page shall constitute a separate tickler certificate, and on said certificate he shall enter the character of the paper, the date of filing and the filing number. The tickler certificate, subject to such change as the case may require, shall be substantially as follows:

Application number

This certifies that the following papers have been filed in the office of the registrar of county affecting, or in connection with an action to register the title to the following described real property, to wit:

(The description to appear here.)

Character of paper	When filed	Filing number

¹ Word "trusts" added.

A memorial of every paper filed with the registrar affecting title to registered property shall be entered at once upon the last original certificate to which it relates. Every paper filed with the registrar affecting the title to property shall be indexed from its contents as follows: In an index showing in alphabetical order in one column or in set of columns the names, places of residence with street numbers, if any, and post-office addresses of all persons in whose interest applications for registration of title are filed; the names, places of residence with street numbers, if any, and post-office addresses of all persons to whom any interest, right, or power in real property is granted or released; and the names, places of residence with street numbers, if any, and post-office addresses of all persons claiming an interest in real property; also, in separate columns the kinds of papers filed, the numbers of the filed papers, the dates of filing, the filing numbers of application to which they relate (if application is pending) and the numbers of the last original certificate to which they relate (if the title to the property is registered). Whenever a judgment or an order of court directs that the title to real property be registered, it shall also direct the registrar to transfer all proper liens and incumbrances filed against the property pending registration to the certificate of title so to be issued. In those counties which have block indexes, an index shall be kept by blocks of all owners of registered property with a reference to the certificate numbers in which the properties are registered. The registrar shall also keep an index of all properties registered under this article in which such registered properties shall be indexed according to a brief description thereof. In any place, however, where there is an official land map showing a division into blocks, such index shall be made according to block numbers; and if a system of indexing by lot numbers is used, the index lot numbers shall be shown. Such index shall also give the number of the certificate of title of such properties.

This section was derived from L. 1908, ch. 444, § 41. It was amended by L. 1916, ch. 47, § 9, by adding the last three sentences.

Recording books and indexes generally: see *supra*, §§ 315, 316.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 410. Notice of filed papers. All papers filed by the registrar, and indexed and entered by him pursuant to this article, shall be of equal effect as to notice, in the order of their filing as shown by their filing numbers, as are similar papers when recorded by county clerk or registers under the recording acts. Should an action for registration be discontinued or otherwise terminated without registration, an order of court to that effect shall be filed with the registrar, who shall at once cause all the papers relating to the title to the property affected, filed with him,

¹ except the notice of application and said order, to be recorded or filed, and indexed, by the county clerk or register (as the case requires) in the order of their filing, on payment of the statutory fees.

This section was derived from L. 1908, ch. 444, § 42. It was amended by L. 1910, ch. 627, § 16. The amendment is shown in the footnote.

Order and time of recording: see supra, §§ 317, 319.

§ 411. Addresses of interested parties; notice. On every paper or instrument filed with the registrar there shall be indorsed the name, place of residence with street number, if any, and post-office address of the person in whose behalf it is filed. The address may be changed from time to time, by such person filing with the registrar a written notice of such change.

This section was derived from L. 1908, ch. 444, § 43. It was amended by L. 1916, ch. 547, § 9. The amendment affected the first sentence which formerly read as follows: "On every paper or instrument filed with the registrar there shall be indorsed the name and post-office address of the person in whose behalf it is filed; and all notices by the registrar or other person relating to the property therein described may be served by mail on such person at such post-office address, except as otherwise provided herein."

§ 412. When a transfer is deemed to be registered. Every transfer of registered property shall be deemed to be registered under this article when the new certificate to the transferee shall have been entered as in the case of first registration; and all other dealings shall be considered as registered when the memorial or notation shall have been entered in the title ² book upon the last certificate of title to the property.

This section was derived from L. 1908, ch. 444, § 44. It was amended by L. 1916, ch. 547, § 9. The amendment is shown in the footnote.

§ 413. New certificates of title. Upon the application of any owner of registered property held under one or more certificates of title and delivering up of such certificate or certificates, the registrar shall issue to such owner, at his option, separate certificates, each for a portion of such property in accordance with such application; and upon issuing any such certificate of title, said registrar shall indorse on the last previous certificate of such property so delivered up a memorial setting forth the occasion of the cancellation thereof and referring to the number or numbers of the new certificates of title so issued.

This section was derived from L. 1908, ch. 444, § 45. It was materially amended by L. 1916, ch. 547, § 9. Formerly it read as follows: "**§ 413. New certificates.** Upon the application of any registered owner of property held under separate certificates of title, or under one certificate, and delivering

¹ Words from here to end of section substituted for following: "to be recorded by the county clerk or register in the order of their filing, on payment of the statutory fees."

² Word "title" substituted for "registration."

up of such certificate or certificates of title, the registrar shall issue to such owner a single certificate of title for the whole of such property, or several certificates, each containing a portion of such property in accordance with such application, and as far as the same may be done consistently with any regulations at the time being in force respecting the parcels of land that may be included in one certificate of title; and upon issuing any such certificate of title, said registrar shall indorse on the last previous certificate of title of such property so delivered up a memorial setting forth the occasion of such cancellation, and referring to the number or numbers of the new certificate or certificates of title so issued."

§ 414. Loss of owner's duplicate. If any duplicate certificate is lost or destroyed or cannot be produced, a duly verified statement, setting forth the facts relating thereto, may be filed with the registrar by the registered owner, or other person in interest. Upon such application, after due notice and hearing, the court may direct the registrar to issue a new duplicate certificate, containing a memorandum of the fact that it is issued in place of a lost duplicate certificate, which shall be entitled to like faith and credit as the original duplicate.

This section was derived from L. 1908, ch. 444, § 46.

§ 415. Mortgages, leases and other liens and charges; may be registered. Any mortgage, lease for a term of over one year, contract to sell or other instrument intended to create a lien, incumbrance, trust or charge on registered property or any right or interest therein, may be registered as herein provided.

This section was derived from L. 1908, ch. 444, § 47.

§ 416. Proceedings to register mortgage, lease or other lien or charge. On the filing of the instrument in the registrar's office and the production of the duplicate certificate of title, if the interested parties agree in a statement as to the nature and effect of the mortgage, lease or other lien or charge, the registrar shall enter such statement upon the proper certificate in the title¹ book, provided such statement be not more than one folio (one hundred words) in length, and also he shall enter upon the owner's certificate a memorial thereof and the date of filing the instrument with a reference to its file number, which memorial shall be signed by the registrar² who shall deliver to the person filing such instrument a certified copy of such instrument certified to be the "registration copy." The registrar shall also note upon the instrument filed the number of the certificate on which the memorial is entered. If the parties in interest fail to agree upon the memorial so to be made by the registrar, he shall refuse to make any memorial thereof until directed by the court to do so, as herein provided. Any mortgage registered pursuant to this section shall be

¹ Word "title" substituted for "registration."

² Words "who shall deliver . . . the 'registration copy'" added.

subject to the provisions of article eleven of the tax law (being chapter sixty-two of the laws of nineteen hundred and nine), and amendments thereof in the same manner as if said mortgage were recorded, as provided by section two hundred and fifty-three of said tax law.

This section was derived from L. 1908, ch. 444, § 48. It was amended by L. 1910, ch. 627, § 17. The amendment added the last sentence. It was further amended by L. 1916, ch. 547, § 10. The amendments are shown in the footnotes.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 417. Judgments, decrees, attachments and other liens to be noted on certificate. No judgment, decree, attachment, execution, mechanic's lien, or other lien or charge, which may affect or be a lien or charge upon real property in this state, shall be or become a lien or charge on real property, or any right or interest therein, the title to which has been registered, unless a transcript, or certified copy, or other duly made or certified document, which is by law proper evidence in a court of record, of such judgment, decree, attachment, mechanic's lien, or other lien or charge, shall be duly filed with the registrar, and a proper memorial thereof made by him upon the certificate of title in the title¹ book. Such transcript, or certified copy, or other duly made or certified document so filed shall have plainly written or stamped thereon the number of the certificate of registration of the title to the property to be affected and bound thereby by virtue of such memorial on such certificate, and it shall be the duty of the registrar to make such memorial immediately on receipt of the same. A discharge, cancellation, or modification of any judgment, decree, attachment, mechanic's lien, or other lien or charge, so noted on the certificate, shall not affect or be binding upon the registered property, right, or interest, unless on like evidence a memorial thereof shall be made by the registrar on such certificate.

This section was derived from L. 1908, ch. 444, § 49. It was amended by L. 1916, ch. 547, § 11. The amendment is shown in the footnote.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 418. Assignment of mortgage, lease, or other lien or charge. The holder of any mortgage, lease, or other lien or charge on registered property, in order to transfer the same or any part thereof, shall execute an assignment of the whole or any part thereof; and upon such assignment being filed in the office of the registrar, and the production of the registration² copy of the instrument, if any, which created the mortgage, lease or other lien

¹ Word "title" substituted for "registration."

² Words "the registration" substituted for "a true."

or charge and which is held by the assignor, the registrar shall enter in the title book a memorial of such transfer with a reference to the assignment by its file number; he shall also note upon the instrument on file in his office intended to be transferred, and upon the registration copy thereof produced, the number of the certificate on which the memorial is entered, with the date of the entry.

This section was derived from L. 1908, ch. 444, § 50. It was amended by L. 1916, ch. 547, § 11. The amendment is shown in the footnote.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 419. Release, discharge or surrender of charge or incumbrance. A release, discharge or surrender of a charge or incumbrance, or any part thereof, or of any part of the property charged or incumbered, may be affected in the same way as is above provided in the case of a transfer. In case only a part of the charge or only a part of the property charged is to be released, discharged or surrendered, the entry shall be made accordingly, but when the whole is released, discharged or surrendered, the registrar shall plainly stamp across the instrument on file, and on the memorial thereof, and on the registration copy produced, the word "cancelled," and shall sign the same. Any tax, water rent or assessment, subject to which the title has been registered and which has been noted on the certificate of title as provided in section three hundred and ninety of this chapter, may be released and discharged in the same way upon a receipt therefor being issued and duly certified by the receiver of taxes or collector of assessments and arrears or other duly authorized officer, as the case may require, and delivered to the registrar and filed in his office. The receiver of taxes or collector of assessments and arrears or such other duly authorized officer, as the case may require, upon demand of any owner of registered property, shall execute, certify and deliver to such owner such receipt when any such tax, water rent or assessment has been paid upon such registered property.

This section was derived from L. 1908, ch. 444, § 51. It was amended by L. 1916, ch. 547, § 11, by adding the last two sentences.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 420. Enforcement of mortgages, charges, liens and incumbrances. All charges, liens and incumbrances on registered property, or on any estate, right or interest in the same, and all rights therein may be enforced as now allowed by law; and all laws with reference to the foreclosure, release or satisfaction of mortgages shall apply to mortgages on registered property or on any estate, right or interest therein, except as herein otherwise provided, and

except that until notice of the pendency of any suit to enforce such mortgage, charge, lien, or incumbrance is filed in the registrar's office and a memorial thereof entered on the certificate in the registration book, the pendency of such suit shall not be notice to the registrar or to any person dealing with the property or any right or interest therein.

This section was derived from L. 1908, ch. 444, § 52.

Action to foreclose mortgage and foreclosure by advertisement: see Code Civ. Pro., § 1626 et seq., § 2387 et seq.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 420-a. Registration under judicial sales. Where a judgment or order in any action or proceeding directs or authorizes a sale of real property, the title to which is then a registered title, the officer appointed to conduct such sale shall be a person who is a duly qualified official examiner of titles, pursuant to the provisions of this article. It shall be the duty of such officer, prior to the date fixed by him for the sale of such property to examine the title thereto in so far as it is affected by the action or proceeding in which such officer is appointed, and to prepare a report thereon, verified by him, stating his approval of such title or his objections thereto. At least one week prior to the day fixed for such sale, such officer shall serve a copy of such report on the attorney for the plaintiff, petitioner or applicant in such action or proceeding. Another copy of such report shall be delivered by such officer to the purchaser on such sale. If in such report such officer approve such title, then unless ten days before the date fixed by the terms of sale for the delivery of the deed the purchaser shall file with the clerk of the court directing such sale a notice that he intends to refuse to complete his purchase of such property, the officer shall apply forthwith to such court, without notice, for an order confirming such sale, and giving such directions to the registrar as may be necessary to enable such registrar to issue a due and proper certificate of title to the purchaser. Upon such application, the officer must submit to the court, to be filed with such order, the original of such report together with proof of service thereof upon such attorney and upon such purchaser, and also his proposed deed for the court's approval; and such approval if obtained shall be noted upon such deed by the court. The fees of such officer as now fixed by law shall be held to be full compensation to such officer, and no extra fees shall be allowed him for his services as official examiner under this section. The registrar upon production of a certified copy of the order approving the report of such officer, and upon receiving the deed thus approved by the court, shall register the title in accordance with such order.

Added by L. 1916, ch. 547, § 12.

§ 421. Powers of attorney to be filed and registered. Before any person can convey, charge, incumber or otherwise deal with any registered property, or any estate, right or interest therein, as attorney in fact for another, the deed or instrument empowering him so to act shall be filed with the registrar and a memorial thereof shall be entered upon the certificate in the title¹ book, in like manner as in the case of a charge or incumbrance.² A revocation of such power of attorney may be registered in like manner as such power of attorney was registered.

This section was derived from L. 1908, ch. 444, § 53. It was amended by L. 1916, ch. 547, § 13. The amendments are shown in the footnotes.

Recording powers of attorney and revocations thereof generally: see *supra*, §§ 294, 326.

§ 422. Reference of doubtful matters to the court. When the registrar is in doubt, and the parties in interest fail to agree as to the proper memorial to be made in the title book of any deed, mortgage or other voluntary instrument presented for registration, the questions shall be referred to the court for decision, either on the certificate of the registrar stating the question, or upon the suggestion in writing of any party or parties in interest; and the court, after due notice to all parties in interest, and a hearing, if necessary or proper, shall enter an order prescribing the form of the memorial to be made by the registrar, who shall make the memorial accordingly. In any judicial proceeding affecting property, the title to which is then a registered title, the court upon the application in writing of any party or parties in interest after due notice to all other parties in interest and a hearing, if necessary or proper, shall enter an order prescribing the form of any memorial that should be made by the registrar in the title book because or as the result of such proceeding; and the registrar, upon the production of a certified copy of such order, shall make the proper memorial in accordance with such order. After making such memorial in the title book the registrar shall also make all other memorials on existing certificates or make and deliver any new certificates according to the circumstances and in the manner required herein.

This section was derived from L. 1908, ch. 444, § 54. It was amended by L. 1916, ch. 547, § 13. The amendment added the last two sentences.

Cited.—This section was cited in *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11.

§ 423. Death of owner of registered property; transfer of property. Upon the death of an owner of registered real property or any estate, right, or interest therein, his heirs-at-law or devisees, at any time after the due entry of a decree of the surrogate's court, probating his will and granting letters testamentary thereon or granting letters of administration, or in case of an

¹ Word "title" substituted for "registration."

² Last sentence added.

appeal from such decree at any time after the entry of a final decree, may make application to the court for an order directing the registrar in what manner the title shall be registered, and in whose name or names it shall be registered; and as to the new certificate or certificates to be issued thereon. Two or more heirs or devisees may unite in one such application. On such application the court, after due notice to all parties in interest and a hearing, if necessary or proper, may enter an order in accordance with said application. On such application the certificate of title of the deceased owner, or a duplicate copy thereof, shall be sufficient and conclusive evidence of his title at the time of his death, and no other evidence of the title up to that time may be produced.

This section was derived from L. 1908, ch. 444, § 55. It was amended by L. 1916, ch. 347, § 13. Before the amendment the section after the words "after the entry of a final decree," in the first sentence, read as follows: "may file with the registrar a certified copy of such final decree, and may make application for a new registration or new registrations of the title and new certificate or certificates thereof. Two or more heirs or devisees may unite in one such application. The proceedings and action on such application shall be the same as in the case of initial registration, except that the registration certificate of the deceased owner, or a duplicate copy thereof, shall be sufficient and conclusive evidence of his title at the time of his death, and no other evidence of the title up to that time may be produced."

§ 424. Certificate of title during settlement of estate. Any new certificate of title, made and entered as prescribed in the preceding section before the final settlement in the surrogate's court of the personal estate of the deceased owner of the real property, shall state expressly that it is made and entered because of transfer of the title from the last certificate by descent or devise, and that such personal estate is in process of settlement. After the final settlement of such personal estate in the surrogate's court, or after the expiration of the time allowed by the code of civil procedure for bringing a proceeding for selling, mortgaging or leasing the real property of the deceased owner for the payment of his debts, the heirs-at-law or devisees may apply to the court in the registration action for an order directing the cancellation of said memorial upon the certificate, which memorial showed that the personal estate was in the course of settlement, and the court, after being satisfied by due proof that said personal estate is completely settled or that said time to apply for selling, mortgaging or leasing the said real property has expired, shall make an order directing the cancellation of said memorial; but the liability of heirs or devisees of registered property, or of such property itself, for claims against the deceased or his estate shall not be in any way diminished or changed by this article.

This section was derived from L. 1908, ch. 444, § 56. It was amended by L. 1916, ch. 547, § 13, by substituting the word "title" for "registration" at the beginning of the section.

Mortgage, lease or sale of decedent's real estate to pay debts: see Code Civ. Pro., § 2702 et seq.

§ 425. Title derived through execution of a power in a will.

When the will of a deceased registered owner of real property, or of any estate, right or interest therein, empowers the executor or executors to sell, incumber or otherwise deal with such property, estate, right or interest, it shall not be necessary for such executor or executors to be registered as the owner or owners thereof; but any person who acquires title through or by virtue of the execution of such power may have such title registered, by proceeding in the same manner as heirs or devisees of a deceased registered owner of real property, as directed and provided by this article.

This section was derived from L. 1908, ch. 444, § 57.

§ 426. Assurance fund. Upon the original registration of real property, there shall be paid to the registrar one-tenth of one per centum of the value thereof which value shall be determined by the registrar but shall not be less than the amount of the last assessment for local taxation. All moneys received by the registrar under the provisions of this section shall be paid to the treasurer of the county (in New York city to the city chamberlain), as an assurance fund for land registered in his county and shall be treated in the same manner as are other funds received for local taxation or for the reduction of the county or city debt. Said treasurer (or city chamberlain) shall keep a separate account of such funds and report annually thereon as required by law in reference to other funds in his hands.

This section was derived from L. 1908, ch. 444, § 58. It was amended by L. 1916, ch. 547, § 13. Before the amendment it read as follows: "§ 426. *Assurance fund.* Upon the original registration of real property, there shall be paid to the registrar one-tenth of one per centum of the value thereof on the basis of the last assessment for local taxation. All moneys received by the registrar under the provisions of this section shall be paid to the treasurer of the county (in New York city to the city chamberlain), as an assurance fund for land registered in his county. Said treasurer (or city chamberlain) shall invest the same as trust funds and report annually thereon as required by law in reference to other funds in his hands. Any person who states, at the original registration of property, that he takes such property without recourse to any action to recover compensation out of the assurance fund for any loss, damage or deprivation, shall not be required to make any payment on account of said fund, in which case the registrar shall plainly place on the certificate of registration of such property or any duplicate or certified copy thereof, the words 'without recourse to the assurance fund.' Nothing herein shall prevent any person owning registered property from making payment to the registrar of the said one-tenth of one per centum of the said local assessed value thereof, whereupon the owner of said property may thereafter avail himself of any right to recover compensation from the assurance fund which right may thereafter arise; and on receipt of such payment the registrar shall cancel the words 'without recourse to the assurance fund' from the certificate of registration, any duplicate or copy thereof."

§ 427. Compensation from assurance fund. Any person who, without negligence on his part, sustains loss or damage or is

deprived of real property, or of any estate, right or interest therein because of the registration of another person as owner of such property, or of any estate, right, or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry of or memorial in the title book, shall have a cause of action against the county treasurer (in New York city the city chamberlain) to recover compensation for such loss or damage.

This section was derived from L. 1908, ch. 444, § 59. It was materially amended by L. 1916, ch. 547, § 13. Before the amendment it read as follows: "§ 427. *Compensation from assurance fund.* Any person who, without negligence on his part, sustains loss or damage or is deprived of real property, or of any estate, right or interest therein, after the original registration thereof, because of the registration of another person as owner of such property, or of any estate, right, or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorial in the registration book, may bring an action to recover compensation out of the assurance fund for such loss or damage; but if the person who is deprived of such property, or any estate, right, or interest therein in the manner above stated has any other right of action or other remedy for recovery on account of such loss or damage, he shall exhaust such remedy before resorting to the action herein provided."

Interest of state in safeguarding assurance fund.—"It may well be that the People of the state are interested in seeing to it that no registration of title is made which shall imperil the safety of this assurance fund." *Barkenthien v. People*, (1913) 155 App. Div. 285, 140 N. Y. S. 100, affirmed (1914) 212 N. Y. 36, 105 N. E. 808, motion for reargument denied with further discussion (1915) 213 N. Y. 554, 107 N. E. 1034.

§ 428. Action against assurance fund. Any allowed claim for indemnity shall be paid in the same manner as other claims against the county. In the city of New York a claim shall be passed upon and approved by the registrar and by the corporation counsel of the city before payment is allowed. The rejection of a claim by the proper county officials (or in the city of New York by the registrar and corporation counsel) shall not preclude the claimant from bringing an action to recover such claim. No claim or judgment on a claim for indemnity shall be binding on the county or on the county treasurer (in New York city the city chamberlain) for an amount exceeding the amount credited to the assurance fund. If the amount credited to the assurance fund is insufficient to pay the claim or judgment in full, the unpaid balance shall bear interest at the legal rate and shall be paid out of the first moneys coming into said assurance fund. If any right of action against any person for damages for negligence or other cause, or under any covenant or contract of warranty or guaranty or otherwise, exists in favor of the person to whom indemnity is paid, the county treasurer (in New York city the city chamberlain) shall be deemed to be subrogated to such right and may bring an action to recover thereunder. Any amounts recovered by the county treasurer (in New York city the city

chamberlain) under such an action shall be credited to the account of the assurance fund. Until the assurance fund provided as aforesaid shall have been exhausted, payment for any such losses or damages shall be made out of such fund.

This section was derived from L. 1908, ch. 444, § 60. It was materially amended by L. 1916, ch. 547, § 13.

§ 429. Restrictions on claims against assurance fund. No person shall recover from the assurance fund any greater sum than the fair market value of the property at the time the right to bring such action first accrued. Any action or proceeding to recover damages out of the assurance fund shall be commenced within six years from the time when the right to begin the same accrued, and not afterward, and such time shall not be extended because of any disability.

This section was derived from L. 1908, ch. 444, § 61. It was amended by L. 1916, ch. 547, § 13. The amendment affected the first sentence which formerly read as follows: "No person shall recover from the assurance fund any sum whatsoever by reason of any loss, damage or deprivation occasioned solely by a breach of trust on the part of any registered owner who is trustee, or by the improper exercise of any power of sale in a mortgage, nor shall any person recover from the assurance fund any greater sum than the fair market value of the property at the time the right to bring such action first accrued."

§ 430. Penalties for fraudulent acts or false certificates. Whoever fraudulently procures or assists in fraudulently procuring, or is intentionally privy to the fraudulent procurement of any certificate of title or other instrument, or of any entry in the registration or other book kept in the registrar's office, or of any erasure or alteration in any entry in said book, or in any instrument authorized by this act, or knowingly defrauds, or is intentionally privy to defrauding any person by means of a false or fraudulent instrument, certificate, statement or affidavit, affecting registered land, shall be guilty of a felony and shall be punished by a fine of not exceeding five thousand dollars, or imprisonment for a period not exceeding five years, or both, in the discretion of the court.

This section was derived from L. 1908, ch. 444, § 62.

Injury to records and false certificates: see PENAL LAW, §§ 1838, 1861, 1871.

Falsely certifying as to record of deeds and instruments: see PENAL LAW, § 1860.

§ 431. Forgery and fraudulent stamping; penalty. Whoever forges, or procures to be forged, or assist in forging, the seal of the registrar, or the name, signature, handwriting of any officer of the registrar's office; or fraudulently stamps or procures to be stamped, or assists in stamping, any document with any forged seal of said registrar, or forges or procures to be forged, or

assists in forging, the name, signature or handwriting of any person whomsoever, to any instrument which is expressly or impliedly authorized to be signed by such person, or uses any document upon which any impression or part of the impression of any seal of said registrar has been forged, knowing the same to have been forged, or any document the signature to which has been forged, knowing the same to have been forged, or swears falsely concerning any matter or proceeding made or done in pursuance of this article, shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for a period not exceeding five years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the court.

This section was derived from L. 1908, ch. 444, § 63.

Forgery generally: see PENAL LAW, § 880 et seq.

§ 432. Fees to be charged. The following fees shall be charged by registrars for the various services performed pursuant to this article:

(a) Filing the notice of application, including entering it in the entry-book, indexing it, and entering it in the tickler certificate book, one dollar.

(b) Filing and indexing the judgment and issuing certificates of title in accordance therewith, and indexing same, five dollars.

(c) Entering, filing and indexing any lien, incumbrance or charge pending registration or subsequent thereto, one dollar.

(d) Entering, filing and indexing a deed or other paper requiring the cancellation of one certificate and the issue of another — for each new certificate issued, two dollars.

(e) Entering, filing and indexing any instrument cancelling any lien or incumbrance on a certificate, fifty cents.

(f) Making any additional certificate, fifty cents.

(g) Entering, filing and indexing a caution, one dollar.

(h) Services of the official examiner of title, when appointed by a register or county clerk, or by the court, one-tenth of one per centum of the value of the property, and ten dollars in addition thereto.

(i) Making, certifying and delivering a "registration copy" of any instrument, as provided by section four hundred and sixteen hereof, a fee computed at the same rate as the fees allowed by law for certifying a copy of a deed.

(j) Furnishing printed forms or for any services for which fees are not herein specified such reasonable charge as may be fixed by the registrar subject to the revision of the court.

This section was derived from L. 1908, ch. 444, § 64. It was amended by L. 1910, ch. 627, § 18; L. 1916, ch. 547, § 14.

Disposition and use of fees received by registrar: see *supra*, § 376.

§ 433. Construction of article. This article shall be construed liberally, so far as may be necessary for the purpose of effecting its general intent.

This section was derived from L. 1908, ch. 444, § 65.

Notice of appeal from judgment of registration.—In carrying into effect the legislative intent declared in the section, it has been held to be proper to file a notice of appeal from the judgment of registration with the registrar, and for him to note such filing on the certificate of title. *Hawes v. Clarke*, (1913) 159 App. Div. 65, 144 N. Y. S. 11; *People v. O'Loughlin*, (1912) 136 N. Y. S. 339; *Lachmann v. Brookfield*, (1911) 135 N. Y. S. 261.

§ 434. Form for official examiner's report of title. The examiner's report of title shall be substantially in the following form with such additions or modifications as may be necessary by reason of laws concerning records affecting the particular locality in which the property is situate and with such additions or modifications as the court may require or deem proper.

OFFICIAL EXAMINER'S REPORT OF TITLE

STATE OF NEW YORK, }
County of.....}.....day of....., 19..

..... reports and liens, incumbrances, defects, rights and interests including report is vested in..... clear of all liens, incumbrances, defects, rights and interests, except as below noted. A full statement has been made of all liens, incumbrances, defects, rights and interests including restrictions, special agreements, covenants, easements, taxes, surveys, judgments, mortgages, and encroachments as they arise in the order of this report, which statement is found in the following pages of this schedule. A brief summary statement of the same is as follows (such summary to be here set out in the order of the paragraphs of this report):

The names and post-office addresses of all persons interested, or claiming to have any rights or interests in said property and the nature of their interests are as follows:

Names.	Post-office address.	Nature of interest.
.....		
.....		
.....		

The names of the other persons interested, or claiming to have any rights or interests, in said property whose post-office addresses and whereabouts are unknown and cannot by diligent inquiry be ascertained are as follows:

Names.	Nature of interest.
.....	
.....	

The facts as to the inquiries and efforts made to find other persons having any rights or interests in said property and the diligence used to ascertain whether or not those known can be served personally with a summons within the state, are set forth in the following detailed statement:

DETAILED STATEMENTS.

1. Description. The following is an accurate diagram of the property proposed for registration in this action, the same having been copied from a survey made by..... dated.....

The above property is more particularly bounded and described as follows:

2. Records examined. Records necessary to determine the ownership of the above-described property and all liens and incumbrances have been examined in the office of the register; clerk of the United States circuit court of the..... district; clerk of the United States district court of the..... district; United States loan commissioners; county clerk; tax collector; comptroller; county treasurer and (state here the other offices in which search has been made in addition to the above). The results of the examination of the records of the various offices above described are herewith set forth in detail separately. In case it has been found impossible to get necessary information to complete this certificate in any respect, a detailed statement has been given showing what efforts have been made.

3. Register's (or county clerk's) office. Search has been made against the following persons for the periods set opposite their respective names, for all conveyances, mortgages unsatisfied of record, assignments of unsatisfied mortgages returned hereon, leases and other instruments of record affecting said premises

A chain of title is given below. It also shows all agreements and instruments of record affecting said property. The special covenants and restrictions, unsatisfied mortgages and agreements appearing in said chain are set forth in detail after said chain of title together with all liens, incumbrances and defects in the register's (or county clerk's) office. (Here set forth chain of title, et cetera, as above.)

PARTICULARS OF EACH MORTGAGE UNSATISFIED.

Mortgagor,
Mortgagee,

Amount,
Dated,
Recorded,

Liber, ...; Page, ...; Sect., ...; Block, ...

(Here set forth all assignments of said mortgage; also any objections to or defects in such assignments.)

4. United States circuit and district courts. Search has been made in the United States circuit and district courts of the district for judgments and decrees as follows:

Names.	From.	To.
--------	-------	-----

Upon such search the following unsatisfied judgments appear:

.....
.....
.....

Search has also been made in the United States district court of the district against all the names appearing in the register's (or county clerk's) search above for petitions in bankruptcy for the same periods as shown in register's (or county clerk's) search above so far as said periods fall within the times during which the bankruptcy acts of eighteen hundred and forty-one, eighteen hundred and sixty-seven and eighteen hundred and ninety-eight were in force.

Upon said search the following petitions appear:

.....
.....
.....

5. Mortgages to the United States loan commissioners. Search has been made for such mortgages against all the names appearing in the register's (or county clerk's) search and for the same periods. Upon such search the following unsatisfied mortgages appear:

6. County clerk's office. Search has been made in this office for judgments, decrees and transcripts of judgments and decrees against the following names for the following periods:

Names.	From.	To.
--------	-------	-----

.....

Upon such search the following unsatisfied judgments are returned, the marginal notes showing what disposition has been made of them by the examiner:

.....

Search has been made in this office for years last past for mechanics' liens affecting said premises. Upon such search the following unsatisfied mechanics' liens appear:

.....

A search has been made against the persons named in the search in paragraph two and for the same periods for notices of lis pendens; certificates of sheriff's and marshal's sales; insolvent

assignments; general assignments; foreclosure by advertisements; appointment of receivers; appointment of trustees, of absconding concealed nonresident or imprisoned debtors; exemptions under the homestead act. A further search for sheriff's certificates has been made against each owner for a period of eleven years subsequent to the search in the register's office and for foreclosure by advertisement to date. Such instruments and notices have been discovered as follows, the marginal notes showing what disposition has been made of them by the examiner:

.....

7. Search has been made for one year last past in the register's (or county clerk's) office for chattel mortgages and conditional bills of sale affecting the premises. Upon such search the following unsatisfied mortgages and conditional bills of sale appear

.....

8. Tax offices. Taxes, assessments and water rates unpaid are as follows:

Year.	Amount.
.....	
.....	

(State in detail all offices, local or otherwise, in which records of taxes, assessments or water rates are kept, in which searches have been made.)

Sales for taxes, assessments and water rates have been had as follows:

(State in detail offices in which searches have been made.)

To.	Date.
.....	
.....	

9. Here insert detailed statement of all searches for liens or incumbrances other than those above set forth.

.....

10. Other interested persons. The following persons who do not reside on the premises claim interest or rights in said property, the nature of their claim in law or equity being herewith set forth in detail:

Name.	Address.	Nature of claim.
.....		
.....		

Then names and post-office addresses of the owners of the adjoining parcels of land are, as far as reasonably obtainable by inquiry on the premises, given below as shown in the diagram:

.....

11. Inspection of property. An inspection of the premises shows the property is occupied by the persons whose names and post-office addresses are set forth below; said occupants having described their interests and claims in said premises as follows:

Names.	Post-office address.	Nature of claim.
.....		
.....		

An inspection of the plumbing, drains and sewers shows the following easements:

.....

An inspection of the walls, halls, roofs, yards and fire-escapes shows easements as follows:

.....

12. Other matters which may or may not be of public record not included above and affecting said title are set forth as follows:

STATE OF NEW YORK, }
County of....., } ss.:

.....
being duly sworn, deposes and says that he is a duly qualified official examiner of title, licensed to practice as such under and by virtue of the laws of the state of New York; that he has personally examined the title to the property described in the foregoing report, and has made the foregoing report, and that the statements contained in said report are true in every particular to the best of his knowledge and belief; and that he has employed all usual means and methods for ascertaining the truth thereof and of all the facts and circumstances affecting and concerning the title to said property.

Sworn to before me, this
day of....., 19..

This section was derived from L. 1908, ch. 444, Schedule A. It was repealed by L. 1910, ch. 627, § 19, and a new section inserted. This new section was amended by L. 1916, ch. 547, § 14.

Cited.—This section was cited in *Lachman v. People*, (1909) 127 N. Y. S. 912.

§ 435. Form for certificate of title. The registrar's certificate title shall be in the following form:

No. First registered

CERTIFICATE OF TITLE.

(First Certificate) or (Transfer from No.)

STATE OF NEW YORK, }
 County....., } ss. :

.....
 of (residence, and if a minor give his age; if under other disability, state the nature of the disability); married to (name of husband or wife, or if not married, say not married); is the owner of an estate in fee simple (or as the case may be) in the following land (here describe the premises) subject to the estates, easements, incumbrances and charges hereunder noted. (In case of trust, condition or limitation, say "in trust" or "upon condition" or "with limitation," as the case may be.)

Witness my hand and official seal this (date).

(Seal)

.....,

Registrar.

MEMORIALS

of estates, easements and charges on the land described in the above certificate of title.

Document Number	Kind	Running in favor of	Terms	Date of registration	Signature of registrar

This section was derived from L. 1908, ch. 444, Schedule B. It was amended by L. 1916, ch. 547, § 15, by substituting "title" in the catch-line for "registration."

ARTICLE 13.

CEMETERY LANDS

Section 450. Lands used for cemetery purposes not to be sold or mortgaged.

451. Acquisition of lands by individuals for cemetery purposes in certain counties.

§ 450. Lands used for cemetery purposes not to be sold or mortgaged. No land actually used and occupied for cemetery purposes shall be sold under execution or for any tax or assessment, nor shall such tax or assessment be levied, collected or imposed, nor shall it be lawful to mortgage such land, or to apply it in payment of debts, so long as it shall continue to be used for such cemetery purposes. Whenever any such land shall cease to be used for cemetery purposes, any judgment, tax or assessment which, but for the provisions of this section would have been levied, collected or imposed, shall thereupon forthwith, together with interest thereon, become and be a lien and charge upon such land, and collectable out of the same. The provisions of this section shall not apply to any lands held by the city of Rochester.

This section was derived from L. 1879, ch. 310.

Exemption from taxation: see TAX LAW, § 4.

Lot owners' rights in cemeteries: see RELIGIOUS CORPORATIONS LAW, § 8.

Cemetery corporations generally: see MEMBERSHIP CORPORATIONS LAW, § 60 et seq.

Purpose of section.—The purpose of the section was to secure to cemeteries not established under the Act of 1847 (L. 1847, ch. 133) exemption from taxation and other immunities which they did not before possess. *People v. Pratt*, (1891) 129 N. Y. 68, 29 N. E. 7.

Exemption from assessments and taxation.—The most cursory glance of the section reveals the inconsistencies of its first two paragraphs. "It is difficult to understand just how a tax or assessment that cannot be levied, collected or imposed upon lands used for cemetery purposes while they are so used can become a charge upon such lands when they cease to be so used. Be that as it may, the question whether lands actually used for cemetery purposes may be taxed or assessed is not open to discussion in this court. Such lands are exempt from general taxation as well as from assessments for local improvements." *Matter of New York*, (1908) 192 N. Y. 459, 85 N. E. 755, modifying 120 App. Div. 201, 105 N. Y. S. 315. See also *People v. Pratt*, (1891) 129 N. Y. 68, 29 N. E. 7; *Buffalo Cemetery Ass'n v. Buffalo*, (1889) 118 N. Y. 61, 22 N. E. 962, reversing 43 Hun 127, 5 N. Y. St. Rep. 394; *Matter of White Plains Presbyterian Church*, (1906) 112 App. Div. 130, 98 N. Y. S. 63; *Oakland Cemetery v. Yonkers*, (1901) 63 App. Div. 448, 71 N. Y. S. 783, affirmed without opinion (1905) 182 N. Y. 564, 75 N. E. 1132; *Matter of Starr Street*, (1911) 73 Misc. 380, 131 N. Y. S. 71; *Op. Atty.-Gen.* (1898) 171. Under the exemption afforded by the section a cemetery association is not only exempt from assessment for street improvements during the period its lands are used for cemetery purposes, but no assessment whatever should be laid against it to be collected in the future when the lands cease to be used for that purpose. The exemption applies not only to the lands of such association actually occupied as graves, but to all lands held exclusively for cemetery purposes. *Matter of New York*, (1907) 118 App. Div. 874, 103 N. Y. S. 1069.

Effect of section 113 of Village Law.—Whether or not this section is repealed by section 113 of the Village Law, providing that no real property

shall be exempt from an assessment for local village improvements, an action lies against a cemetery association to recover the cost of building a sidewalk in front of its premises; for, in any event, the judgment may be satisfied out of the personal property of the corporation, or out of lands not actually used for cemetery purposes, if such there be, and the judgment may become a lien upon lands actually used for cemetery purposes if at any time they cease to be so used. *Gouverneur Village v. Gouverneur Cemetery Ass'n*, (1909) 136 App. Div. 37, 120 N. Y. S. 221, reversing 62 Misc. 534, 116 N. Y. S. 1107.

Lands in which no body is buried.—The lands of a cemetery association organized under the former Act of 1847 (L. 1847, ch. 133) by virtue of the provision thereof (§ 10), which declared that the cemetery lands and property of any association formed under the act shall be exempt from taxation, are exempt from the moment they are acquired by the association, and continue exempt so long as the corporation exists, although no dead body is buried therein, and although by a valid ordinance, passed after its incorporation by a municipality within whose limits its lands lie, the burial of the dead therein is forbidden. *People v. Pratt*, (1891) 129 N. Y. 68, 29 N. E. 7.

Certiorari to review assessment.—In a proceeding by certiorari to review an assessment of real estate by town assessors the petition of the relator is the complaint, and the return of the assessors is the answer, and the general rules of pleading are applicable thereto. Under these rules the allegations of the petition are controverted or put in issue only by a general or specific denial, and a material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged in the petition or from which a denial may be implied or inferred. An allegation, therefore, in the petition that land assessed is actually used and occupied for cemetery purposes and is exempt from taxation is not controverted by statements in the return inconsistent therewith or from which a denial may be implied or inferred, and in such a case it is error for the court to dismiss the writ. *People v. Stilwell*, (1907) 190 N. Y. 284, 83 N. E. 56, reversing 119 App. Div. 913, 104 N. Y. S. 1137.

Mortgage of cemetery lot.—It has been held that the owner of a cemetery lot could not execute a valid mortgage thereon. *Thompson v. Hickey*, (1880) 8 Abb. N. Cas. 159.

Cited.—This section was cited in *George v. Cypress Hills Cemetery*, (1898) 32 App. Div. 281, 52 N. Y. S. 1097; *Grace v. Repose Mausoleums*, (1912) 78 Misc. 213, 139 N. Y. S. 300; *Schroder v. Wanzor*, (1885) 36 Hun 423.

§ 451. Acquisition of lands¹ for cemetery purposes in certain counties. It shall not be lawful for any person to take by deed, devise or otherwise or set apart or use any land or ground in any of the counties of Westchester, Kings, Queens, Richmond,² Rockland, Suffolk or Nassau for cemetery purposes without the consent of the board of supervisors for such county, or of the board of aldermen of the city of New York, as the case may be, first had and obtained in like manner as provided for in the membership corporations law; and said board of supervisors or board of aldermen in granting such consent may annex thereto such conditions, regulations and restrictions as such board may deem the public health or the public good require.

This section was added by L. 1909, ch. 274, and amended by L. 1912, ch. 300. The amendments are shown in the footnotes.

Acquisition of real property by religious corporations for cemetery purposes: see RELIGIOUS CORPORATIONS LAW, § 7.

Cemeteries in Kings, Queens, Rockland, Westchester, Nassau, Suffolk and Erie counties: see MEMBERSHIP CORPORATIONS LAW, § 62.

Cited.—This section was cited in *Grace v. Repose Mausoleums*, (1912) 78 Misc. 213, 139 N. Y. S. 300.

¹ Words "by individuals" omitted.

² "Richmond" new.

ARTICLE 14

LAWS REPEALED; CONSTRUCTION; WHEN TO TAKE EFFECT.

Section 460. Laws repealed.

461. Construction.

462. When to take effect.

§ 460. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

This section was Real Property Law, L. 1896, ch. 547, § 300.

References to repealed provisions: see GENERAL CONSTRUCTION LAW, § 80.

§ 461. Construction. This chapter does not alter or impair any vested estate, interest or right, or alter or affect the construction of any conveyance, will or other instrument which has taken effect at any time before this chapter becomes law.

This section was real Property Law, L. 1896, ch. 547, § 1, part.

Application of General Construction Law to this statute: see GENERAL CONSTRUCTION LAW, § 110.

§ 462. When to take effect. This chapter shall take effect immediately.

This section was Real Property Law, L. 1896, ch. 547, § 301.

SCHEDULE OF LAWS REPEALED.

*Revised Statutes... Part 2, chapter 1, title 1, sections 1 to 4
and 8 to 20, inclusive
Revised Statutes.... Part 2, chapter 1, title 2, sections 1-62,
64-148
Revised Statutes.... Part 2, chapter 1, titles 3-5. All
Revised Statutes.... Part 2, chapter 2, ... All
Revised Statutes.... Part 2, chapter 3, ... All
Revised Statutes.... Part 2, chapter 7, title 1. All

Laws of	Chapter	Section
1782.....	2.....	All
1784.....	18.....	All (8th Sess.)
1786.....	12.....	All
1787.....	4.....	All
1787.....	36.....	All
1787.....	37.....	All
1787.....	43.....	All
1787.....	44.....	Part relating to real property
1787.....	48.....	All

* Inserted and expressly repealed by L. 1909, ch. 240, § 92, in effect April 22, 1909, §§ 1 and 3-7, ch. 1, L. 1794, were already included in schedule but not in chronological order.

Laws of	Chapter	Section
1788.....	7.....	All
1788.....	36.....	26-28
1788.....	44.....	All
1788.....	45.....	All
1788.....	46.....	32-34
1792.....	51.....	All
1793.....	50.....	All
*1794.....	1.....	1 and §§ 3 to 7, inclusive
1794.....	44.....	All
1797.....	18.....	All
1798.....	17.....	All
1798.....	72.....	All
1798.....	78.....	All
1798.....	95.....	3
1799.....	44.....	7
1800.....	61.....	All
1801.....	90.....	25, 26
1801.....	155.....	All
1801.....	156.....	All
1801.....	169.....	All
1802.....	49.....	All
1804.....	109.....	26
1805.....	25.....	All
1805.....	98.....	All
1805.....	128.....	3
1806.....	17.....	All
1806.....	167.....	All
1806.....	168.....	All
1807.....	74.....	1
1807.....	123.....	2
1808.....	175.....	All
1809.....	44.....	1
1811.....	1.....	2
1811.....	7.....	All
1811.....	95.....	All
1811.....	238.....	4
R. L. 1813....	31.....	All
R. L. 1813....	32.....	All
R. L. 1813....	80.....	1-4, 7-9
R. L. 1813....	97.....	All
1814.....	5.....	All
1816.....	119.....	All
1817.....	69.....	1, 3-5
1818.....	55.....	5, 6

* Inserted and expressly repealed by L. 1909, ch. 240, § 95, in effect April 22, 1909. §§ 1 and 3-7, ch. 1, L. 1794, were already included in schedule but not in chronological order.

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Repeals, Construction, etc.

Laws of	Chapter	Section
1819.....	25.....	All
1821.....	136.....	All
1822.....	245.....	1-4, 6
1822.....	254.....	All
1823.....	263.....	All
1825.....	307.....	All
1826.....	260.....	All
1826.....	297.....	1-3
1826.....	313.....	All
1827.....	204.....	All
1828.....	241.....	All
1828.....	20.....	15, ¶¶ 25-29, 46-47 (2d Meet.)
1828.....	21.....	1, ¶¶ 5, 8, 9, 14-16, 66, 94, 96, 97, 210, 226, 327, 368, 399, 453, 485 (2d Meet.)
1829.....	222.....	All
1830.....	171.....	All
1830.....	320.....	10-13
1831.....	172.....	All
1832.....	171.....	All
1833.....	167.....	All
1834.....	272.....	All
1835.....	275.....	All
1836.....	339.....	All
1838.....	32.....	All
1839.....	295.....	5
1840.....	238.....	1
1840.....	318.....	Part relating to real property
1841.....	261.....	Part relating to real property
1843.....	87.....	All
1843.....	145.....	All
1843.....	199.....	All
1843.....	210.....	5
1845.....	109.....	All
1845.....	110.....	All
1845.....	115.....	All
1846.....	74.....	Part relating to real property
1846.....	182.....	3
1846.....	274.....	All
1847.....	170.....	All
1848.....	195.....	All
1853.....	303.....	All
1854.....	111.....	All
1855.....	17.....	All
1855.....	432.....	Part relating to real property
1855.....	547.....	All

Laws of	Chapter	Section
1856.....	61.....	All
1857.....	576.....	All
1858.....	259.....	All
1860.....	322.....	All
1860.....	345.....	All
1860.....	396.....	All
1862.....	365.....	All
1863.....	246.....	All
1865.....	421.....	All
1867.....	557.....	All
1868.....	513.....	All
1868.....	798.....	All
1870.....	208.....	All
1872.....	120.....	All
1872.....	141.....	All
1872.....	358.....	All
1873.....	551.....	All
1873.....	583.....	All
*1794.....	1.....	1, 3-7
1874.....	261.....	All
1875.....	38.....	All
1875.....	336.....	All
1875.....	545.....	All
1877.....	111.....	All
1879.....	249.....	All
1879.....	310.....	All
1880.....	115.....	All
1880.....	300.....	All
1880.....	530.....	All
1882.....	100.....	All
1882.....	275.....	All
1882.....	278.....	All
1883.....	80.....	All
1884.....	26.....	All
1884.....	326.....	All
1886.....	40.....	All
1886.....	257.....	All
1887.....	539.....	All
1888.....	246.....	All
1889.....	42.....	All
1889.....	406.....	All
1890.....	61.....	All
1890.....	173.....	1
1890.....	282.....	All
1890.....	475.....	All

* So in original.

L. 1909, ch. 52

Repeals, Construction, etc.

Laws of	Chapter	Section
1890.....	502.....	All
1890.....	503.....	All
1891.....	100.....	All
1891.....	155.....	All
1891.....	172.....	All
1891.....	209.....	All
1892.....	208.....	All
1892.....	516.....	Part relating to real property
1892.....	616.....	All
1893.....	123.....	All
1893.....	182.....	All
1893.....	207.....	All
1893.....	599.....	All
1893.....	701.....	Part relating to real property
1894.....	315.....	All
1894.....	729.....	All
1895.....	171.....	All
1895.....	525.....	All
1895.....	793.....	All
1895.....	886.....	All
1895.....	1022.....	All
1896.....	249.....	Part relating to real property
1896.....	547.....	All, except §§ 280-296
1896.....	572.....	2, 3
1897.....	136.....	All
1897.....	277.....	All
1897.....	593.....	All
1897.....	756.....	All
1898.....	174.....	All
1898.....	311.....	All
1898.....	338.....	All
1899.....	147.....	All
1899.....	542.....	All
1900.....	227.....	All
1901.....	84.....	All
1901.....	166.....	All
1901.....	287.....	All
1901.....	291.....	Part relating to real property
1901.....	481.....	All
1901.....	611.....	All
1902.....	151.....	All
1903.....	88.....	All
1903.....	98.....	All
1903.....	419.....	All
1903.....	432.....	All
1903.....	490.....	All

Laws of	Chapter	Section
1904.....	235.....	All
1904.....	528.....	All
1904.....	690.....	All
1904.....	692.....	Part relating to real property
1904.....	742.....	All
1905.....	329.....	All
1905.....	377.....	All
1905.....	393.....	Part relating to real property
1905.....	449.....	All
1905.....	450.....	All
1906.....	398.....	All
1907.....	242.....	All
1907.....	289.....	All
1907.....	347.....	All
1907.....	621.....	All
1907.....	633.....	All
1908.....	35.....	All
1908.....	61.....	All
1908.....	136.....	All
1908.....	173.....	Part relating to real property
1908.....	444.....	All

NOTES TO SCHEDULE OF REPEALS.

Prepared by the Board of Statutory Consolidation and printed in their report of 1907 at page 4907.

L. 1784, Ch. 18. Act relating to cancellation of mortgages. Obsolete.

L. 1786, Ch. 12. An act to abolish entails. All of this act except §§ 2 and 7 was repealed by L. 1828, Ch. 21, § 1, ¶ 5. Sections 2 and 7 are now practically obsolete or repealed by implication.

L. 1787, Ch. 43. Concerning fines and recoveries of lands and tenements. Obsolete.

L. 1793, Ch. 50. Regulates conveyances by British subjects. Probably obsolete. In any event it is superseded by later acts (see § 301) and should be repealed.

L. 1794, Ch. 44. Extends time for depositing military deeds, etc., and regulating duties of clerks of Herkimer and Onondaga counties in respect to military deeds. The act is self-executing, obsolete, and the clerks' duties are covered by legislation of a later period. This act may safely be repealed. The Real Property Law and other acts cover the same ground.

L. 1798, Ch. 78. Regulates registry of deeds in counties of Ontario, Steuben, Tioga, Herkimer, Oneida, Chenango and Otsego. Practically obsolete. The subject-matter is covered by

later legislation inconsistent therewith and the act should be repealed.

L. 1798, Ch. 95, § 3. This section amended L. 1798, Ch. 72. The last-mentioned act was repealed by L. 1896, Ch. 547, § 300. The amendatory act should be repealed.

L. 1805, Ch. 128, § 3. Extended the operation of L. 1801, Ch. 155, since repealed.

L. 1806, Ch. 17. Ceased to operate by express limitation. Obsolete.

1 R. L., Ch. 80, §§ 1-4, 7-9. Regulates lands in military tract. Obsolete.

1 R. L., Ch. 97. Regulates recording of deeds. Sections 1-5, 8, 9, expressly repealed and §§ 6, 7, 10, 11 are obsolete and inconsistent with later legislation.

L. 1814, Ch. 5. Regulates recording of deeds of lands in the military tract. Obsolete.

L. 1826, Ch. 313. Authorizes county clerks to make general indexes of bonds and mortgages. Superseded by general provisions operative throughout all the counties of the State.

L. 1827, Ch. 204. Requires numerical indexes to the registers and records of mortgages in certain counties. Superseded by later legislation.

L. 1828, Ch. 241. Relates to acknowledgment of deeds by the agent of the Holland Land Company. Obsolete.

L. 1828, Ch. 20, § 15, ¶¶ 25-29, 46, 47. These sections amend portions of the Revised Statutes since repealed. They are dependent and should in turn be repealed.

Repealing statute. As the statutes covered by express repealing acts have been repealed by the consolidated laws, the repealing statutes themselves have been recommended for repeal.

L. 1830, Ch. 320, §§ 10-13. Section 12 expressly repealed. Sections 10, 11, 13 amend provisions of the Revised Statutes since repealed, and incorporated in the Real Property Law.

L. 1831, Ch. 172; L. 1832, Ch. 171, and L. 1833, Ch. 167. Extend time allowed by L. 1830, Ch. 171, for resident aliens to make and file depositions. Latter act was repealed by L. 1896, Ch. 547, § 300. Temporary and obsolete.

L. 1836, Ch. 339, and L. 1838, Ch. 32. These acts are temporary, extending to resident aliens certain provisions of the Revised Statutes since repealed.

L. 1840, Ch. 238, § 1. Abolishes office of commissioner of deeds and devolving powers and duties on justices of the peace. The "Executive Law" now regulates the powers and appointment of Commissioners of Deeds within the State.

L. 1840, Ch. 318. Consolidated in Real Property Law § 114.

L. 1841, Ch. 261. Consolidated in Real Property Law, § 114.

L. 1843, Ch. 145. Regulating indexing of deeds and mortgages in Rensselaer county. Superseded by later legislation.

- L. 1846, Ch. 74.** Consolidated in Real Property Law, § 61.
- L. 1855, Ch. 17.** Consolidated in Real Property Law, § 18.
- L. 1855, Ch. 432.** Consolidated in Real Property Law, § 61.
- L. 1862, Ch. 365.** Sections 1, 2 and 4 have been superseded by being amended "to read as follows." Sections 1, 4 by L. 1868, Ch. 798, §§ 1, 2. Section 2 by L. 1882, Ch. 100, § 1. Sections 3 and 5 are consolidated in Real Property Law, §§ 342, 344.
- L. 1873, Ch. 583.** The unrepealed part of § 1 of statute cited is consolidated in the Real Property Law, § 231. Section 2 is covered by the Real Property Law, § 231.
- L. 1879, Ch. 310.** Consolidated in Real Property Law, § 370.
- L. 1882, Ch. 100.** Consolidated in Real Property Law, § 341.
- L. 1882, Ch. 278.** Consolidated in Real Property Law, § 343.
- L. 1886, Ch. 40.** Consolidated in Real Property Law, § 261.
- L. 1890, Ch. 503.** Consolidated in Real Property Law, §§ 360-366.
- L. 1892, Ch. 516.** Section 1 was amended "to read as follows" by L. 1905, Ch. 393, § 1. Balance of act is consolidated in Real Property Law, § 115.
- L. 1893, Ch. 701.** Section 2 was amended "so as to read as follows" by L. 1901, Ch. 291, § 1. Balance of act is consolidated in Real Property Law, § 113.
- L. 1895, Ch. 793.** This chapter amends R. S., Pt. 2, Ch. 3, § 5, relating to acknowledgment of conveyances in foreign countries, which is repealed by L. 1896, Ch. 547, § 300. The matter is covered by Real Property Law, § 301, and the act should be repealed.
- L. 1895, Ch. 1022.** Amended R. S., Pt. 2, Ch. 1, Tit. 3, §§ 13, 14, and R. S., Pt. 2, Ch. 2, § 1. These sections of the Revised Statutes were afterwards transferred to the Real Property Law and repealed by L. 1896, Ch. 547, § 300. L. 1895, Ch. 1022, should not be repealed, as the substance of the acts is contained in the Real Property Law.
- L. 1896, Ch. 249.** Consolidated in Real Property Law, § 117.
- L. 1896, Ch. 547.** This chapter is the "old" Real Property Law. With the exception of Art. 9, relating to descent of real property, which is consolidated in Decedent Estate Law, Art. 3, its live provisions are re-enacted in Consolidated Real Property Law, and the chapter may be repealed.
- L. 1896, Ch. 572, § 2.** This section amends R. S., Pt. 2, Ch. 3, § 1, since repealed by L. 1896, Ch. 547, § 300. Pt. consolidated in Real Property Law, § 291, and remainder covered by said section.
- L. 1897, Ch. 136.** Section 2 was amended "to read as follows" by L. 1907, Ch. 242, § 1. Balance of act consolidated in Real Property Law, § 105.
- L. 1897, Ch. 277.** Consolidated in Real Property Law, §§ 254, 258.

- L. 1897, Ch. 593. Consolidated in Real Property Law, § 10.
- L. 1897, Ch. 756. Consolidated in Real Property Law, § 14.
- L. 1898, Ch. 311. Consolidated in Real Property Law, § 105.
- L. 1898, Ch. 338. Consolidated in Real Property Law, §§ 271-273.
- L. 1899, Ch. 147. Consolidated in Real Property Law, § 310.
- L. 1900, Ch. 227. Consolidated in Real Property Law, § 72.
- L. 1901, Ch. 287. Consolidated in Real Property Law, § 340.
- L. 1901, Ch. 291. Consolidated in Real Property Law, § 113.
- L. 1901, Ch. 481. This chapter added § 290a to "old" Real Property Law. Art. 9 of the "old" Real Property Law, of which § 290a is a part, has been transferred to Decedent Estate Law, and this chapter may be repealed.
- L. 1901, Ch. 611. Subdivisions 2, 6 and 7 of this chapter have been superseded by being amended "so as to read as follows" by L. 1903, Ch. 98, § 1, and L. 1904, Ch. 528, §§ 1, 2, as noted in schedule. Balance of chapter is consolidated in Real Property Law, § 301.
- L. 1902, Ch. 151. Consolidated in Real Property Law, § 111.
- L. 1903, Ch. 88. Consolidated in Real Property Law, § 103.
- L. 1903, Ch. 98. Consolidated in Real Property Law, § 301.
- L. 1903, Ch. 419. Consolidated in Real Property Law, § 299.
- L. 1903, Ch. 432. Consolidated in Real Property Law, §§ 57-71.
- L. 1904, Ch. 106. This chapter amended Real Property Law, § 288. Article 9 of the "old" Real Property Law, of which § 288 is a part, has been transferred to Decedent Estate Law, and this chapter may be repealed.
- L. 1904, Ch. 528. Consolidated in Real Property Law, §§ 301, 308.
- L. 1904, Ch. 690. Consolidated in Real Property Law, § 301.
- L. 1904, Ch. 692. Consolidated in Real Property Law, § 274.
- L. 1904, Ch. 742. Consolidated in Real Property Law, § 116.
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- L. 1905, Ch. 377. Consolidated in Real Property Law, § 331.
- L. 1905, Ch. 393. Consolidated in Real Property Law, § 115.
- L. 1905, Ch. 449. Consolidated in Real Property Law, § 290.
- L. 1905, Ch. 450. Consolidated in Real Property Law, § 306.
- L. 1906, Ch. 398. Consolidated in Real Property Law, § 300.
- L. 1907, Ch. 242. Consolidated in Real Property Law, § 107.
- L. 1907, Ch. 289. Consolidated in Real Property Law, § 322.
- L. 1907, Ch. 347. Consolidated in Real Property Law, § 321.
- L. 1907, Ch. 621. Consolidated in Real Property Law, § 323.
- L. 1907, Ch. 633. Consolidated in Real Property Law, § 311.

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